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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 259

S. D. TILNEY, W. C. HAM, ET AL.,
Petitioners,

vs.

CITY OF CHICAGO, A VOLUNTARY MUNICIPAL CORPORATION, AND OTHERS, INDIVIDUALLY AND AS TRUSTEES,
Respondents.

Petition for Writ of Certiorari.

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Petition for Writ of Certiorari.

To the Honorable Justices of the Supreme Court of the United States:

Your petitioners, S. D. Tilney, C. N. Boord, W. C. Ham, John S. Ankeney and Howard J. Rolfe, and others in like situation as a class (Tr. 5) pray the issuance of a writ of certiorari to review the decision of the United Circuit Court of Appeals for the Seventh Circuit, rendered April 16, 1943, affirming an order of dismissal of complaint in suit, entered by the District Court of the United States at Chicago on April 6, 1942. A petition for rehearing was promptly filed and denied by said Circuit Court of Appeals on May 14, 1943. The opinion by the Circuit Court of

Appeals is reported in 134 Fed. (2d) at page 682. Timely application for review by this court is made on or before August 12, 1943. The petition is presented in accordance with Section 240 of the Judicial Code as amended and Rule 38 of this Court as amended.

SUMMARY OF THE MATTER INVOLVED.

S. D. Tilney and others filed in United States District Court at Chicago a complaint in civil suit in equity on March 10, 1942 (Tr. 2 to 65). Several Exhibits are attached in support of the complaint (Tr. 65-95). The complaint seeks the restoration and performance of a trust, for the municipalization of street railways in the Chicago area by consumer cooperative financing. That fund accumulated from net residue of fares paid by petitioners, pursuant to the ordinances of the City of Chicago adopted February 11, 1907 and thereafter. Those ordinances and said trust for the benefit of car riders as consumers of street car service were approved and confirmed by decrees entered in the United States District Court at Chicago. Those decrees followed upon mandates sent down by this Supreme Court and by the Court of Appeals for the Seventh Circuit (Tr. 136ff), as part of reorganization proceedings in equity for street railways at Chicago, conducted in that chancery court during the year 1903 and thereafter. Said proceedings were general equity and foreclosure matters. Said decrees were entered pursuant to directions given upon appeals from prior orders, taken before the year 1907 to this Supreme Court and to said Circuit Court of Appeals (Tr. 136ff). Said final decrees and said ordinances and the payment of fares by your petitioners pursuant to the same, are all contractual matters (Tr. 138-140); and are under protection of the bill of rights and constitution, as to the validity of contracts, equal protection of the law and due process of law.

In the District Court upon motion by respondents under Rule 12(b) of the Federal Rules for Civil Procedure to dismiss complaint (Tr. 99), an order of dismissal was entered in the District Court (Tr. 102). Upon an appeal taken by your petitioners, the Circuit Court of Appeals affirmed the order of dismissal and denied the petition for rehearing (Tr. 117, 159). Said petition for rehearing constitutes an assignment of errors for review by this Court (Tr. 119-157). Your Honors are requested to read that petition.

FOREWORD.

At the beginning of this century Street Railways at Chicago and elsewhere in this country were rendering poor service and were falling into court receiverships. In Chicago and many cities there were elections based upon Municipal ownership campaigns. There arose such an election at Chicago. The proponent became Mayor. Then arose the further question of borrowing the money for purchase or accumulating the money from fares before purchase should be made. The latter plan prevailed. The year 1907 ordinances which are basic in this record, embodied that plan. The money has accumulated. The purchase is overdue and has not been made. Predatory interests are blocking any performance of the trust. This proceeding was brought to remedy that situation. The courts below say in effect that those whose contributions of money have aggregated the trust fund, are forbidden to speak at Court. Only those who perverted the trust and wish to waste the resources of the fund, may be heard in courts of the United States. That is the ruling to date of the courts in this case.

STATEMENT OF FACTS.

Synopsis of the Pleading Record.

The plaintiffs filed their original complaint in chancery asking for the restoration and administration of the trust fund provided for by Municipal and court records in the year 1907, and accepted thereafter by your petitioners who are Revenue paying Street Car Riders (Tr. 2-95). Plaintiffs filed also a motion for relief *pendente lite*, seeking discovery, expenses for trial and other preliminary relief. The defendants filed their appearance and motion to dismiss the complaint, asserting lack of jurisdiction upon various grounds (Tr. 98). The suit was dismissed (Tr. 102) and this appeal was taken by the plaintiffs (Tr. 103).

The A-paragraphs of the complaint deal with the parties, the basis for a class suit, the fund and the amount involved in the suit (Tr. 2-6), one hundred million dollars.

The B-paragraphs deal with the trust powers, equities and funds, which establish basic rights of the plaintiffs (Tr. 6-19).

The C-paragraphs of the complaint charge various breaches of trust by the defendants (Tr. 19-45).

The D-paragraphs of the complaint ask for various relief. The Exhibits consist of documentary material to support in detail the charges made by the complaint (Tr. 45-64).

The complaint begins as follows (Tr. 2-3):

"Source of Complaint.

"A-1) The plaintiffs herein are citizens of the United States, and have been and continue from time

to time, to be car rider revenue patrons who have paid, on many days during many years, cash fares upon demand as hereinafter stated, in excess of reasonable and just compensation, for travel services within the City of Chicago, upon each of the transportation systems hereinafter mentioned, which at all times herein concerned, continuously are operating as common carriers within and adjacent to the City of Chicago:

"The Fund.

"A-2) These excess cash fares were paid by plaintiffs only after demand made therefor, by said common carrier systems as an agency for the defendants, as provided by certain primary ordinance trust agreements hereinafter mentioned, before plaintiffs were permitted to have such public service transportation services, and thereby the excess moneys beyond reasonable charges for such transportation, were taken from the plaintiffs, by coercion and force against their wills and without any authority or consideration whatever, other than said trust agreements, but expressly and exclusively to become part of the car-riders-overcharge-trust-fund, to be determined by fixed percentages of all moneys collected, and subject to accounting for said fund, and restoration in equity as herein demanded, and as provided by sovereign constitutions and statutes, which were made for the protection of plaintiffs: all as hereinafter more fully stated:

"Amount in suit is sufficient.

"A-3) The sum of money and value of fund, herein claimed and in controversy, with all interest and costs excluded, exceeds the sum or value of Three Thousand Dollars. Each and all of the plaintiffs named and described at paragraphs A-5 to A-8 in this complaint, have a beneficial interest and indivisible right in equity, vested by said trust agreements since February 1,

1907, to enforce the full performance of the car-riders-overcharge-trust herein mentioned."

Paragraph A-4 states the names and residences of the named plaintiffs who are all non-residents of the State of Illinois. Paragraph A-5 indicates the number of unnamed plaintiffs described as members of the class of revenue paying car-riders. Paragraph A-6 charges that plaintiffs are the sole beneficiaries of the fund. Paragraphs A-7 and A-8 charge the facts to show that this is a class suit. Paragraph A-9 states that the plaintiffs sue the defendants. Paragraph A-10 names the Trustee defendants who are all residents of the State of Illinois (Tr. 3-6).

Paragraph B-1 shows that the trust was declared February 1, 1907. Paragraph B-2 shows that the trust continues in force and Paragraph B-3 shows that the trust is now in operation. Paragraph B-4 states the basic language of the primary trust ordinances. Paragraph B-5 states acts of confirmation. Paragraph B-6 shows the private nature of the trust. Paragraph B-7 shows the names given to the fund. Paragraphs B-8 and B-9 established basic money facts about the trust. Paragraphs B-10 and B-11 show confirmation of the trust by City Council and Corporation Counsel. Paragraph B-12 shows that defendants were warned about trust duties. Paragraph B-13 shows that defendants failed to seek court advice about their trust duties. Paragraph B-14 shows that rights and remedies claimed by the complaint are applicable for the entire period of time mentioned by the complaint. Paragraph B-15 shows that this is an irrevocable express active trust. Paragraph B-16 shows the fiduciary relations. Paragraph B-17 shows that the trust relationship became vested. Paragraph B-18 shows that the trust is guaranteed by the City of Chicago. Paragraph B-19 shows that this trust for plaintiffs is pursuant

to the Constitution. Paragraph B-20 shows that the rights of the plaintiffs and the duties of the defendants are inseparable. Paragraph B-21 shows the amount of the fund in trust. Paragraph B-22 shows that the City Council of Chicago confirms the trust. Paragraph B-23 shows the basic purposes of the trust (Tr. 7-19).

Paragraph C-1 shows that the trust is now in danger. Paragraphs C-2 and C-3 show various wastes of the trust funds. Paragraph C-4 shows that defendants propose to renounce their trust duties. Paragraphs C-5, C-6, C-7, C-8, C-9, C-10, C-11, C-12 and C-13 show various departures from trust duties, wrongful administration and general waste. Paragraphs C-14, C-15, C-16, C-17, C-18, C-19, C-20, C-21, C-22, C-23, and C-24, show the duty of the trustees to make disclosure, their failure to do so, their various acts of fraud, duress and wrongful use of funds so that they are about to be lost. Paragraphs C-25, C-26 and C-27, show that the demands by plaintiffs are not performed; that the defendants are adverse to the trust; and that the defendants are now disqualified to act as trustees. Paragraph C-28 shows failure to seek court advice. Paragraphs C-29 and C-30 show delays in payment by the defendants, and need for court to control the trust. Paragraphs C-31, C-32, C-33, C-34, C-35, and C-36, show that the trust was fully recognized by the City Council, the Mayor of Chicago, and the Alderman, at the time the ordinances were passed in 1907. Paragraphs C-37 to C-41 show that the defendants in various ways have sought to evade and to breach the trust, and to misuse their powers (Tr. 19-45).

Paragraph D-1 asks for summons. Paragraph D-2 makes the jurisdictional statement required by Rule 8 of federal rules of civil procedure. Paragraph D-3 shows that the court has constitutional duties to perform. Paragraph D-4 shows that the trust is based upon the Constitution. Paragraph

D-5 shows that there are peremptory duties under the Constitution. Paragraph D-6 shows the irrevocable duties of the defendants. The remaining D-paragraphs show various grounds for relief, and ask for special sorts of relief (Tr. 46-64).

The E-paragraphs are exhibits consisting of various official documents of the City of Chicago, which have from time to time confirmed this fund to be a trust fund (Tr. 65-95).

Respondents are Voluntary Trustees.

Upon the offer made by their own ordinances, the defendants voluntarily became trustees, to collect the funds in question, with power and duty to invest only in street railways at Chicago.

The complaint states that the City of Chicago is a voluntary municipal corporation (Tr. 6), and that the other defendants as its several officers, are voluntary actors as to this trust property (Tr. 6). The purely voluntary nature of cities, towns and villages, as contrasted with counties, townships, and other administrative units and arms of general government is elementary. The voluntary nature of its government was successfully relied upon by the City of Chicago in the case of *Cook County* v. *City of Chicago*, 311 Ill. 234 at 237. The matter is adequately discussed by that opinion of the Supreme Court of Illinois.

How the trust fund was established.

The complaint shows that for some time before the year 1907 the street railways of Chicago were in receivership and were undergoing reorganization in the Federal Courts at Chicago. As part of that reorganization, separate ordinances for each of several street railway companies were passed by the Council of the City of Chicago.

All of said ordinances became effective as of February 1, 1907, upon acceptance by the several companies at later dates. The basic language of every one of said ordinances is set forth in the complaint (Tr. 8) as follows:

"B-4) The language of said primary ordinances, which establish said car-riders-overcharge-trust and are basic for this complaint, reads in each of said primary ordinances, substantially as follows:

'Division of Remaining Net Receipts.

'After the deduction from the gross receipts of the items hereinbefore in this section provided, the amount remaining shall be considered as the net receipts for the operation of the street railway system hereby authorized, and shall be divided between the Company and the said City in the following proportions: forty-five (45) per cent to be retained by the Company and fifty-five (55) per cent to be paid forthwith by the Company to the said City, crediting thereon all amounts paid out during the preceding year by the Company for license fees, if any, exacted from the Company and employes.

'It is further provided that, subject to the action of the City Council of said City, *the said City shall deposit the amount so paid to the said City to the credit of a separate fund to be kept and used for the purchase and construction of street railways by said city;* but any failure to comply with this provision shall in no way affect the rights or obligations of the Company under this ordinance."

Administration and interpretation as a trust fund.

After February 1, 1907 the defendants have received as said 55% of net operations of street railways, various sums of money from time to time. On January 1, 1937

the defendants by an ordinance of the City of Chicago, admitted that they held in the fund approximately Seventy Million Dollars (Tr. 12). The report of the City comptroller as of January 31, 1941, charges the respondents with more than Seventy-five Million Dollars (Tr. 157). The printed annual reports of said comptroller of the City of Chicago distributed periodically and filed in many financial libraries show this fund as a special fund and among other trust funds for each year from the year 1907 to the present date.

That this fund was held only as a trust fund, is admitted by a great many other official documents promulgated and placed of record by the defendants. Of these, examples are shown by official opinions of many corporation counsellors of the City of Chicago (Tr. 78 to 95), and by the present Corporation Counsel and his assistants (Paragraph B-11, Tr. 13). This is also shown by the wording used in the *proposed* traction ordinance passed in 1930, which failed to become effective by want of acceptance by the Companies. That language appears at Paragraph B-10 of the complaint (Tr. 13). The trust relationship also is shown by many collateral provisions of the 1907 ordinances, which are shown and expressed throughout the complaint and the Exhibits (B-6, Tr. 10 and B-22, Tr. 18 are examples).

The language of the 1907 ordinances quoted above from Paragraph B-4 of the complaint (Tr. 8):

> "It is further provided that, subject to the action of the City Council of said City, the said City shall deposit the amount so paid to the said City to the credit of a separate fund to be kept and used for the purchase and construction of street railways by said City; *but any failure to comply with this provision shall in no way affect the rights or obligations of the Company under this ordinance.*"

shows clearly that the payment of said fund to the City was a complete discharge and acquittance to the street railway companies of their obligation under the ordinances, to the extent that payment has been made, and that their rights and obligations do not include any power to inquire about or to control any disposition of said fund beyond the point of payment of the same to the City.

Municipal ownership by issuance of certificates under the Mueller law (Ill. Rev. Statutes 1941, Chap. 24, Section 65-4ff.) has not been attempted by the City of Chicago (Tr. 41 ff.). The case of *Chicago Ry. Co.* v. *City of Chicago,* 292 Ill. 190, was a litigation to make some application of the same ordinances that are involved in the present case. Present plaintiffs were not parties to that suit. But the Court ruled at page 197:

> "It was intended that the share paid to the City should purchase the property, (Street railways at Chicago) and the City or its licensee would then operate the railways. There was a supplementary unification ordinance (1913, Tr. 9-B5) passed by which the street railways were to be operated as a single system, with the same rate of fare and division of the income."

These 1907 Ordinances Remain Controlling.

It is common knowledge, shown by many public documents, that in the years 1918, 1925, 1930 and in 1941, the City Council of Chicago passed new traction ordinances looking toward reorganization to supersede the 1907 ordinances. (See annual published reports of the Board of Supervising Engineers.) Substantial portions of the 1930 and 1941 ordinances are set forth in this complaint (Tr. 12-13, 21-22 and elsewhere). None of said ordinances have become effective. None of them have

been accepted at any time by any operating Company Each of said ordinances provide that it would not become operative unless and until the operating company named therein should accept and confirm the same. No ordinance or plan to purchase and operate the street railway under said Mueller Law, by issuance of *income* certificates to be similar to water fund certificates, has been tried. Since no later ordinance has yet become operative as to street railways, the 1907 ordinances as amended for joint operation in 1913 (Tr. 9-B5) remain controlling for all purposes of this suit.

By the motion to dismiss (Tr. 98), the defendants admit on this record all the foregoing and other facts shown by the complaint. Appellants submit that the trust fund and trust relationship are not controverted upon the present record.

Bernard Fichter v. *Milk Wagon Drivers Union Local 753,* 382 Ill. 91.

Kerner v. *Thompson,* 293 Ill. App. 454 at 460, 13 N. E. (2d) 110 at 113.

Proof for Petitioners by Verified Complaint.

Petitioners refer Your Honors to the verified complaint and exhibits in this record. By that verification the Court has before it, *admitted proof* of all ordinances and municipal records therein mentioned. (See Ill. Rev. Stats. Chap. 51, Sections 48a, 48b and 18: Chapter 24, Section 7-50.) Those ordinances and municipal records establish a trust for benefit of your petitioners, and an administration of it that has been admitted officially by the defendants, for at least thirty years before the filing of this suit.

ANALYSIS OF ADVERSE OPINION BY CIRCUIT COURT OF APPEALS.

The Ruling That Fund Is Ownerless.

The District Court and the Circuit Court of Appeals base the dismissal orders upon their statement that petitioners have no property interest to enable an application to the court (Tr. 114). They do not say who could raise the question. It stands admitted by the motion to dismiss the complaint, and by the opinion of the Circuit Court of Appeals, that a trust was created, that a fund was established, and that there has been vast and serious wastage of the money (Tr. 99, 115 ff.).

The complaint charges (Tr. 59-D-27), that neither the State of Illinois, nor the Treasurer of Cook County, nor the City of Chicago as a municipality, have any right or power to raise the question. Facts and authorities have been given to establish that that is so. The motion to dismiss admits that that is so. Nothing in the opinion by the Court of Appeals refutes that that is so (Tr. 114 ff.). The net result of the ruling by the District Court, and by the Circuit Court of Appeals, and the net effect of the opinion by the Court of Appeals, arrives at an absurdity. What they say is that this fund of One Hundred Million Dollars is outside the pale of court relief. Anyone can waste or steal this fund with impunity. Such ruling ignores the cases cited below at pages 37 ff. The complete indifference to that situation by the courts now under review, only adds to the tragic seriousness of the utter breakdown in morality and conscience, which is shown throughout this record.

No one has questioned that this record shows a fund dedicated to a specific purpose; namely, a trust fund "to be kept and used for the purchase and construction of street railways" at Chicago. No one has questioned on this record the fact that no part of the fund has been so kept or used. No one has questioned that it is shown by this record that the entire fund has been misappropriated and dissipated. The money has been misused by complete departure to other and different purposes, to benefit wholly new groups of people. By misappropriation purchase of Street Railways has been thwarted and long delay is accomplished. No one has questioned on this record the fact that said waste and dissipation of the fund, and departure in use of the fund, constitute an open defiance to basic laws of property, basic laws governing future interests, the basic principles of trust relationships, and the plain dictates of conscience and common honesty at all times and everywhere. These by-passed bases of law are the very foundation of modern courts of equity.

Highways Not Rentable in Illinois. No Street Rental and No City Compensation Became Part of this Trust.

The opinion by the Court of Appeals (Tr. 115) ignores wholly the pleading by petitioners (Tr. 54-55 and 123 K and 142-146), which establishes that this is a private fund and is not a taxpayer fund. That pleading by petitioners stands uncontested on this record by any pleading or defense. When for the first time after thirty-five years assurance that this is a trust fund (Tr. 65-95), petitioners are told that the City may suddenly reverse its position and boldly declare that it holds the money as street rental, we submit that petitioners have shown right to hearing on the merits. We submit further that the fund could not arise as street rental, because in Illinois public streets cannot be rented to anyone for any purpose at any time (337 Ill. 200: Tr. 10, 145).

The City as a municipality gave no consideration for the 55% fund. The 55% arose after deducting many charges, *"crediting thereon all amounts paid out during the preceding year by the Company for license fees, if any, exacted from the Company or its employes."* Vast deductions were made under this language before the residuary 55% arose. Those deductions are shown by the official report of the Board of Operations as of January 31, 1941 (Tr. 11 and 65 to 78). Those deductions included not only license fees, but many other municipal claims and charges.

Petitioners Seek Street Railway Service.

The statement in the opinion by the Circuit Court of Appeals (Tr. 115) that petitioners seek distribution to them out of the fund is not so. The complaint asks only for restoration of the fund and application of the fund to the purpose stated in the 1907 Ordinances (Tr. 64-0). Namely for Municipalization through consumer financing. The court should keep in mind at all times that the fares were placed at five cents in the year 1907, instead of three cents, for the definite purpose of assembling the fund to purchase the street railway system (Tr. 40 ff.) The (I.M.O.) Immediate Municipal Ownership campaign, to be financed by the issuance of Mueller income certificates, was defeated; in favor of the slogan "get the money first" which was urged by those who advocated (E.M.O.) Eventual Municipal Ownership, by car-rider-consumer financing. The payments made in advance for thirty-six years by the revenue patrons (your petitioners) have more than paid for the Street Railway Systems at Chicago. Your petitioners are vested with all rights to have that better and improved transportation service for which this record shows they have fully and generously paid in advance.

There could not be any ruling by Illinois Commerce Commission adverse to property rights of your petitioners.

By seeking to inject the Illinois Commerce Commission into the case, the defendants and the Court of Appeals take the position that the fares were fixed by the Commission and that the entire fare went to the street car companies as owners and that they as such owners then turned 55% of the net earnings over to the City. That position does not accord with the facts. That assumption is rank misconception. The 55% never did belong to street car companies, unless they held it as trustees. By the 1907 Ordinances which they accepted, their earnings were impressed with the trust at the moment that the riders parted with their money. When that net portion of the fare, whatever the fare may be, has been turned over to the City, it is provided that it must be "kept and used for the purchase and construction of Street Railways."

Furthermore, the Commerce Commission did not tamper nor interfere with this car-rider consumer fund in any way. They did not change it nor attempt the slightest control over it. They accepted it as a deduction to be made by the Companies from net earnings. The car riders had no reason whatever to intervene. The fund was left intact as created. The commission never had any control over that money, at any time whatever.

Error by Courts below is departure from Constitution.

By the complaint and the petition for Rehearing and this petition, we have shown that no determination by the Commerce Commission could modify this trust, which was established more than six years before there was any such Commission (Tr. 43, 141). This trust fund could not be put in issue before the Commission. Under the constitution and law of Illinois all questions of ownership and

control over a trust fund is exclusively matter for the forum of a court of equity. *Cummings* v. *Smith,* 368 Ill. 94 at 105.

No determination by the Illinois Commerce Commission, nor by any court to test the same, has any bearing upon the legality of the fares or rates, nor upon any question of ownership of funds or property arising from reasonable or maximum fares, rates or charges permitted by order of such commission (Tr. 147-151). *Interstate Commerce Commission* v. *Inland Waterways Corporation,* 318 U. S. ....., 63 S. Ct. 1296 at 1304; *RFC* v. *Bankers Trust Co.,* 318 U. S. 163 at 170. The opinion by the Circuit Court of Appeals to the contrary (Tr. 115, 135) is fundamental error (Tr. 136, 149-151). That opinion and decree are denial of constitutional right of plaintiffs to a court forum for the judicial questions presented by this record.

Historic Consumer Cooperative.

Rights in common both real and personal have lasted for centuries and now remain a substantial feature of our social order. Among those rights the consumer cooperative is a basic institution of Democratic Society.

Rights in common both real and personal have been for centuries and now remain, a substantial feature of our common law. Among those rights the consumer cooperative is a basic institution of Democratic Society. Rights of common for pasturage of cattle, for fishing, for taking ice, for hunting wild game, for baking bread at an oven or grinding grain at a mill, are familiar instances. Currently there are: boating clubs, game hunting clubs, outing and mountain climbing clubs, hospital and medical service associations, turnpike associations, toll bridges, sewer and water and irrigation service districts, and countless others which charge the consumer a

small set fee whenever service is requested. These groups make use of public waters, public wild fowl, public highways and other public bases. The patrons of street railways have an abiding right of passage in the streets. It is elementary that the applicant who comes within the class fixed for enjoyment of any such right of common has had always the protection of our courts in the maintenance of the common fund which maintains the service in each case. Such rights have ever been common, and never were apportionable.

Re Aliena.

If it were true as the opinion by the Circuit Court of Appeals contends, that the petitioners do not have legal ownership to the fund, it would not follow that they have no right to pursue this suit. It stands admitted that petitioners are the only donors to that fund. There have always been in the law many sorts of interest in the property of others, which could be pursued, protected and enforced. *Re Aliena* is a large branch of the law of property. There are easements of many kinds. There are rights to light and air and rights to lateral support. The mortgagee may prevent the mortgagor wasting the substance of the property subject to lien. For instance may prevent destruction of valuable timber or buildings. There have always been charges on the property of others to raise portions and to provide annual support and for many other uses. A mere announcement of this field of law, is sufficient to show how superficial is the opinion under review, and lacking in understanding of the infinite variety of uses enforceable at court which may be carved out of basic property, either by express language as shown by this record, or by implication and social utility by direct action of the court as illustrated by the foregoing suggestions.

A distant tax-payer, not within the consumer area of a special assessment district, was allowed to intervene and be heard on objections, because as tax-payer he must be contributory and so has an interest in the charge made for public benefit at the street intersections. Those objections were heard and the proceedings were dismissed.

City of Moline v. *Greene*, 252 Ill. 475 at 480.

The Cooperative in Modern Law.

The modern co-operative economy was well established in England a century ago (Rochdale). The consumer co-operative and other phases of this economic order has spread to every State and territory of the United States and to most countries of the world. This voluntary development is at the heart of growing economic democracy. Some idea of the extent of this movement will be obtained by examining a **three volume index** now in the better libraries. That **index** is called "Literary Development of Co-operative Principles and Data: W.P.A. New York City, Series A." Part one, Index of Laws pertaining to Co-operation: Part two, Abstracts of the Laws pertaining to Co-operation in the United States, its possessions and territories: Part three, Bibligraphical Review of Literature on Legal Phases of Co-operation.

The consumer cooperative movement has advanced so far that in the State of Oregon and other places, the statute has made wide provisions for what are called Peoples Utilities. This is not municipal ownership in the usual sense, but a special form of consumer enterprise which seeks to enable the consumer motive to apply itself in a very flexible manner throughout the broad utility field named in the statute. This enables the consumer in a direct way to exercise a democratic control over the utility rendering the service to him. This manner of direct eco-

nomic control reduces greatly or substitutes in place of the utility regulation by state wide commissions. The Oregon plan of Peoples Utilities is discussed in a recent case:

> *Board of Directors of Northern Wasco County Peoples' Utility District* v. *Kelly,* 137 Pac. (2d) 295 at 299 and 306.

Correct reading and understanding of this court record will show that the Statutes in Oregon and other states are examples of the same Social Order intended by the 1907 Street Railway Ordinances at Chicago.

The Main Question Presented By This Petition.

The District Court suggested orally and the Court of Appeals say by its opinion (Tr. 114-116); that petitioners have no property interest in the fund to which it is admitted they have made contribution. Those courts say also that petitioners are not plaintiffs to require court performance of said trust. It follows that the basic question is one of law, namely:

What is the meaning and legal effect of the language of the 1907 street car ordinances,

> "a separate fund to be kept and used for the purchase and construction of street railways" (Tr. 8)?

What do those words mean in the light of the history of those ordinances, and the directions given by this Court and by the Circuit Court of Appeals, by opinions filed at that time; and in the light of the subsequent decrees by the District Court in confirmation of said opinions and said directions and said ordinances? Is this suit to restore and account for this social trust fund, proper litigation at the foot of said decrees so directed by courts of review in the year 1907 and thereafter? Has the District Court or the Circuit Court of Appeals any

discretion under the Constitution, to deny or limit the right of plaintiffs as cash revenue donors to said trust and as beneficiaries of this trust, to maintain this suit upon said admitted trust? Are those courts forums of grace and discretion, or do they perform obligatory duties under the Constitution?

Reasons Relied Upon For Issuance of the Writ.

By acts of conscience the chancellor has created our law of Equity. Shall equity and conscience now part company by denying to petitioners a forum which has been provided by the constitution, for accounting for social trust funds deposited by these petitioners! The record shows a deliberate intention by respondents and an executed purpose to frustrate and destroy this trust. It shows their purpose to hinder, delay and prevent the municipalization of street railways at Chicago. They seek to erase the fund created by money from your petitioners.

The inviolability of all *social trusts* in this country, is involved by the wilful acts by respondents toward the destruction of this trust fund, and the departure attempted by them from the purposes stated by the year 1907 ordinances. Existing trust funds in this country, which have little or no regular supervision by courts or executive government, now manage funds aggregating several billion dollars. Here now is presented a matter of public importance as surely as in *Mahnomen County Minnesota v. United States*, 63 S. Ct. 1254 at 1256 and like decisions.

By those ordinances of 1907 the funds exclusively are to be "kept and used for the purchase and construction of street railways" (Tr. 8, 115, 145). It stands admitted that the fund has not been *kept* and has not any of it been so *used*. The decrees of said District Court in the years

1907 and 1908, entered on mandates from this Supreme Court and said Circuit Court of Appeals (Tr. 139), confirm and adopt said ordinances of the year 1907 and thereafter, as contractual obligations of all parties thereto and all parties to this present record.

Meaning of basic trust language.

The words *Separate Fund* (Tr. 8) can mean only that the moneys are never to be part of any City of Chicago corporate or general fund. "To be kept" clearly are special words of limitation opposed to such historic phrases as "to have and to hold." To require that one must *keep* and must *use* his own money for a specific purpose, would be a contradiction in terms—would be words contrary to each other, would be rank absurdity. To keep money safely is the primary duty of every trustee and Fiduciary. The phrase "used for the purchase and construction of Street Railways" is a purpose so plain and direct that any man who walks the street can understand without restatement. That *use* has all the clearness and definiteness that words can possess. The only possible direct beneficiaries of such language and such fiduciary deposit of money, are the revenue patrons of said street railways, your petitioners, who created this fund specifically for the consumer ownership of said Street Railways to provide improvement of service and use for your petitioners. "Purchase and construction" include all current betterment and improvement in the art of communal transportation.

The social, legislative, economic and political history behind the 1907 ordinances (Tr. 39 to 43), shows that the 55% was intended to be a trust fund, and that the five cent rate of fare (Tr. 42), initially provided for by the 1907 contract ordinances, included a surplus of two cents for the purpose of making the 55% share a sufficient fund

within 20 years (1927) to purchase the street railway systems of Chicago (Tr. 40 ff.) for the benefit and use of the car-riders who were by the ordinances required to pay that additional two cents per ride to create the fund to purchase the street railways.

Analysis of Modern Consumer Cooperative.

The failure of the Courts below to understand this case, may be explained as a failure to appreciate the economic nature of this trust for the revenue patrons of street railways. Lawyers, office holders and business men are familiar with profit arrangements, with interest arrangements, and also with producer co-operative arrangements. Among the latter are trade associations, pooling of patents, and agreements by producers and merchandisers for buying commodities and selling the same. They are familiar also with eleemosynary and other philanthropic arrangements, where the return is purely spiritual.

The consumer co-operative social device seems to be absent from the main stream of legal and business thinking. The purpose of the consumer co-operative is not profit, nor interest, nor spiritual returns. The main purpose is advancement and betterment on the physical side of living, without debt. The consumer members as a whole own the co-operative as surely as all the stockholders own a corporation. But in neither case do they have the legal title and in neither case do they share any responsibility personally for the debts of corporation and co-operative. The oldest and most current example is the family, where each contributes of effort or supplies or money without any expectation of return other than more adequate physical comfort and better living surroundings. Farmers have always used this principle in their annual group arrangements for the slaughtering of food animals, for planting, harvesting and thrashing grain. The co-operating

group goes about from farm of one member to the farm of another member to produce the crops and living supplies in a joint manner, with much less effort and much less machinery. The store consumer co-operative enables the member to purchase more goods for the same money. It is called a discount, but usually there is no return of interest, profit or cash to the member. Ordinarily when a consumer co-operative breaks up, little or nothing remains for distribution or partition. The consumer co-operative is a social means that meets in a simple, direct and obvious manner the current desires and needs of its members, and quietly records their changing desires and new ways of living. It is the most flexible of all ways of human action. This economic device has not produced any volume of litigation. The reason may be related to that flexibility and quick response to the basic desires and comforts of the common man.

Examples of consumer co-operative where litigation has arisen are found mostly in the voluntary municipal field. Thus where a bond issue was voted to provide a consumer service, and the money collected, and afterwards it was determined that the bond issue was void, the money did not belong to the municipality, but must be returned to the contributors as a resulting trust. This was ordered even though the money had been assembled as municipal levy for taxes. *Town of Aurora* v. *C.B. & Q. Ry.*, 119 Ill. 246. Similar cases are these: *Haraway* v. *Zambie*, 157 S.W. (2d) 504 and *3105 Grand Corporation* v. *City of New York*, 288 N.Y. 178, 42 N.E. (2d) 475, *Site of Fort Dearborn* v. *City of Chicago*, 318 Ill. App. 139 at 143 and *Flanagan* v. *City of Chicago*, 311 Ill. App. 135. In these cases the court ordered that the surplus beyond the requirements of the co-operative consumer enterprise, must be returned to the contributors as a resulting trust.

Where there was originally a water system owned outright by the City of Dublin, and later there were contri-

butions by many householders pursuant to statute, for reconstruction and extension of that water system, the House of Lords reversed the Chancellor for Ireland, and ruled that the municipal officers must account to the contributing householders for all the money so received. (See page 35 below). That the fund must be restored and the extensions must be made for which the money was collected. (*1 Bligh* N.R. 312 at 361ff.). The courts have always enforced a close adherence to the specific purposes for which money has been paid or property delivered in trust (See page 38 ff below).

Modern Property Is Vested but Intangible Future Interest.

As shown by this petition at pages 8 to 20, the narrow conception of tangible property adopted by the Circuit Court of Appeals as its basis for right to have court relief, has no support in the decided cases. That narrow physical concept never has had expression since some dicta were made by Lord Eldon. In modern life it is elementary that most property investments are made without any expectation of power to possess or manage the remote physical properties that are owned in the possessory and management sense by corporations, associations or trustees. Membership in law libraries and educational museums are examples. (The modern corporation—Berle & Means; The Managerial Revolution—Burnham.) The opinion by the Court of Appeals at bar would take away from modern investors all court relief as to all but a negligible amount of what is called *property* by everybody and by all other courts in the modern world.

Trust has priority regardless of insolvency.

It is elementary that trust priorities survive even bankruptcy (Tr. 156). This court should protect the earlier decrees, and enforce the prior law of this case (Tr. 122),

vested in plaintiffs by said court decrees; should prevent waste and sabotage (Tr. 148); should assure equal protection of the law (Tr. 151) and due process of law, and should maintain the constitution (Tr. 154).

The bold determination by the respondents to use this fund without limitation, and in utter disregard of the basic language of purpose for the trust; namely, to be "kept and used for the purchase and construction of street railways," is emphasized when we consider the well known fact that the elevated railways were organized and are operated under the laws of Illinois governing steam railroads. Those laws are distinct and separate, having a wide cleavage different from the laws pertaining to street railways. The decisions of the Supreme Court of Illinois as to that cleavage and separation are well known, and were well known before these ordinances were adopted in the year 1907 and ever since. Any claim by the respondents that they could ever by the remotest argument justify the use of the fund or any part of it, for the construction of subways in Chicago to be used by the elevated railroads in their transportation, shows a moral bankruptcy beyond any redemption. Even if it ever had been true, or ever will be true that any substantial number of persons using the elevated system of railway transportation also might or would use the street railway system of street transportation. The fact is that the lay out of the two systems of transportation is such that any interchange of passengers between them, which may be arranged in the future, will be an utterly negligible percent of the total travel upon either system.

Since the wrong to an individual consumer with reference to a particular service is a matter of pennies on any particular day, it would be impossible for humble citizens to carry to the courts by separate individual lawsuits, their grievances about consumer cooperative services. It would

also be absurd for the court to be hearing complaints separately from many individuals, about a state of facts which would be the same to all of them. Only by this manner of class suit can relief be sought.

So long as the Car Riders Service and Purchase Fund remained intact, it served as an economic force for the trustees to compel the Street Railway Companies to obey the orders of the Commerce Commission and the City Ordinances. For that reason even persons who do not favor consumer ownership of utilities, urged that it was highly essential to keep the car riders fund available at all times. Those who hold to that opinion maintain that by dissipating the car riders' fund, the respondent trustees threw away the major control which they held as trustees in the public transportation program.

The defendants by timely application in chancery for instructions and guidance in the management of this trust, could have prevented and rendered unnecessary the wastage of millions of dollars in the Street Railways *company reorganization* proceedings at Chicago. Defendants wilfully have failed to perform that duty, and now boldly renounce all their duties as trustees under the 1907 Ordinances (Tr. 19).

Faithful trustees must avoid forbidden morals of the market place.

Meinhard v. *Salmon,* 164 N. E. 545 at 546:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising

> rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. *Wendt* v. *Fischer,* 243 N. Y. 439, 444, 154 N. E. 303. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

The foregoing opinion by Judge Cardozo was quoted from and approved by Mr. Justice Douglas in the case of *Woods, Trustee,* v. *City National Bank,* 312 U. S. 262 at 269. Similar doctrine is confirmed by *Hilmer* v. *Bishop,* 316 Ill. App. 411, 45 N. E. (2d) 188 at 189-190.

Contrasted Record of Faithful Trustee Against Record of Wanton Trustee.

It appears from thirty-fifth annual printed report, of Board of Supervising Engineers under the year 1907 Ordinances for the year ending January 31, 1942, (Ex. T, page 85) that an aggregate of more than *three hundred million* dollars had been collected and retained as interest and company share by the Street Railway Companys, after the year 1907 and before date of this report. Out of that money the bondholders have been paid regularly. The interest due August first 1943 in the sum of $1,833,447.30 has been paid upon said bonds now said to be currently outstanding. The trustee established under the year 1907 ordinances and the trust deed pursuant thereto, for protection of said bonds and for collection and distribution of interest, has been diligent and successful, notwithstanding all the vicissitudes of the years in question.

Compare that record with the conduct of respondent trustees having duties to your petitioners under the same Ordinances:

1) By deliberate written acts they have dissipated Seventy-five million dollars in open disregard of the plain purposes of the trust (Tr. 157).

2) Since the year 1931 they have failed to demand or collect any additions to the fund (Tr. 157).

3) They have failed to make any investments pursuant to the elementary duty of trustees, and have ignored entirely the statutes of Illinois which govern and control such investments (Tr. 51, 94, 157).

As was said by this Court speaking by Mr. Justice Holmes, (*New York Trust Co.* v. *Eisner,* 256 U. S. 345 at 349) * * * "A page of history is worth a volume of logic."

4) Although the Street Railway properties were offered for sale on May 29, 1936, under mortgage foreclosure decrees dated May 11, 1931, and a bid less than thirty-two million dollars was reported to the court on June 19, 1936, the respondents stand aloof without making any bid, and still allow the record to remain in that condition (Tr. 147). That sale in collateral proceedings was given an interlocutory approval by order of the District Court on November 21, 1936. No confirmation of the sale has ever been made. It remains under advisement by that court and subject to its order (17 F.S. 181), in said wholly collateral proceedings. Although they had ample funds in hand (Tr. 12, 157), respondent trustees have taken no action whatever to perform their duties as to the purchase of said properties, at said sale or at any other time.

In a city of great distances such as Chicago, where an average car rider spends two hours daily on public transportation, failure to provide a comfortable seat and sufficient space for reading and relaxation, during the trip to and from work, or market or place of recreation, is a matter of primary importance to the social order. When that service has been paid for in advance by the consumer

class, that public importance should be paramount reason for inquiry and determination by this Court. That conditions of crowding and increase of standees and strap-hangers grows worse each year is common knowledge. It would be considered inhumane to load cattle or sheep as compactly as people are now herded upon street railway transportation at Chicago (Tr. 44).

Under the year 1907 Ordinances down to date, your petitioners as said consumer class have paid as car fare (including the purchase price) an aggregate sum nearly **two billion** dollars. (The figures from February 1, 1907 to January 31, 1942 appear at Exhibit T page 85 of the thirty-fifth official annual report of said Board of Operating Engineers). The time for fruition of E. M. O. (page 3 above) has arrived.

Public dangers from trust sabotage.

If this trust is sabotaged successfully, then all social security programs in this country are additional follies. That follows whether they be private or governmental. All cooperative endeavors of democracy will be at the mercy and discretion of reactionary groups who are entrenched and able to wield economic pressure, and current political seizure for any momentary use or partisan expense. The assurance of security for all consumer cooperatives will be erased. The prophetic language of Mr. Winston Churchill will have been translated into fact; there will be no longer any "steady continuity of values." And without that basis there can no longer be *"any faith between man and man or between individual and state"* (Tr. 156). Unless reversed by this court, the record at bar follows the road back to jungle ways of social order.

Misconduct of other trusts by respondents.

The recurrent practices and conduct of the defendants at bar, to delay beneficiaries and to waste special trust funds, (for instance, Real Estate Assessment and condemnation moneys) by all manner of departures and diversions from their trust purposes, is shown by many decided Illinois cases. Among them are *Site of Fort Dearborn* v. *City of Chicago,* 318 Ill. App. 139 at 143, *Flanagan* v. *City of Chicago,* 311 Ill. App. 135, *City of Chicago* v. *Union Trust Company,* 138 Ill. App. 545, *Barber* v. *City of Chicago,* 139 Ill. App. 121, and *Conway* v. *City of Chicago,* 237 Ill. 129, 131 ff.

An orientalist at the University of Chicago remarked the other day that it is a well known fact of ancient history, that Egyptian officialdom had sabotaged and stolen all the security funds set up for maintenance and operation of the earlier burial tombs in the Nile Valley, within a century after those funds were established. It appears from the 1943 appropriation ordinance of the City of Chicago passed January 8, 1943 (Page 8170 of City Council Proceedings) that history is about to repeat itself after five thousand years, by consummation of a deliberate like waste and destruction of the trust fund for car-riders; unless this court takes action to stay the largest operation by confidence game that has yet been attempted.

How Street Railway transporation has been financed.

In New York and some other cities of this country, a low street car fare has been maintained by charging the deficit to the general taxpayer and the common public revenues. In Boston at the present time, the deficit is charged to the State, pursuant to statute. In Chicago there seems always to have been a public attitude against

that kind of public policy. The recurrent breakdown in Chicago of street car and other transportation services which have been financed purely on the profit and interest economic basis, which go to bankruptcy by accumulation of debt; is commonly known and is recorded in all sorts of public documents, including the litigations which are listed at Exhibit A to this petition (page 58 below).

Consumer Cooperative in this Record.

A reading of said cases and of the record in this case, makes it clear why this consumer co-operative, car-rider trust was decided upon in the year 1907, as the most likely solution of recurrent bankruptcy of transportation companies in the Chicago region. Within the limits of this petition it is not possible to do more than state the fact. There is vast literature on the subject. Much of it is governmental and matter for judicial notice.

The failure of respondents to administer fairly and faithfully this co-operative consumer trust, has led to a wastage of more than ten million dollars in court expenses at Chicago, in an attempt which has been futile for the past seventeen years, to reorganize the street railway companies in the Federal Courts *upon a profit and interest basis.* That very basis has been a complete failure for almost a hundred years, as shown by this record and other extensive public record. The language of this trust was carefully drawn (Tr. 8) (during court reorganization 1903) to prevent either the street car companies or their stockholders or their bondholders (making any inquiry, or) from even a claim to have the slighest interest whatever to direct or control this trust. That was a very wise provision. The trustees must be free to bargain and purchase the street railways in the most advantageous manner. The 1907 ordinance built a fire wall around this trust to prevent it going down should financial cataclysm carry away the reorganized Street Railway Companies. All the litigations which

those people having property interest in the street railways, have carried on among themselves in Courts of Illinois and the Federal Courts of Chicago, (some of them are in Exhibit A hereto) have no legal relevancy and cannot control the interpretation and performance of this trust. Your petitioners were not parties to any of those litigations. The social purposes of the 1907 ordinances could not be destroyed by any of these litigations. The courts below on this record wholly overlook that language of the trust agreement in the 1907 ordinances (Tr. 8).

Erosion of Bills of Rights.

It has been said that liberties and bills of right may be "lost in time by steady legal erosion wearing down broad principles into thin right." Petitioners deem it idle to mention civil liberties, or for anyone to discuss freedom from want and freedom from fear, if our courts callously do sanction this bold seizure of a fund exceeding one hundred million dollars created for the purpose of consumer financing and ownership of Street Railway Systems of Chicago, to free that service forever from political sabotage. The reserved sphere of individual liberty and privacy of property, guaranteed by all our constitution, (page ..... above) thereby is made a mirage. Our cherished civil liberties thereby would become an economic quicksand. There can be no self-realization for any human being, but only the stunted life of economic serfdom, under official oppression and the selfish devices of individuals dominant at the time by association with economic power groups, if our sturdy law of trusts and economic cooperation may be frittered away by the clever political confusion shown by this record! Petitioners urge that the constitution should be maintained. And urge that said trust should be restored and performed as their purchased security and sanctuary.

Five decades of cooperative economy.

Petitioners respectfully suggest that the debt-interest-profit-dividend form of insurance organizations, came to grief in this country during the 1900's, and life insurance was rescued tardily only by major legislative surgery. So that insurance since then is largely of the consumer mutual co-operative type in this country. Likewise in the second decade of this century, the money of the people was lost in large measure when loaned on foreign securities of the old order. Those losses brought about co-operative foreign credit arrangements. And again in the third decade of this century alien property and also oil reserves came to heavy grief, because there was no consumer co-operative for direct control or use. And again in the fourth decade the money of the people came to grief in the mortgage banks that were organized under the old order. Only after great distress and much national legislation was a safe consumer co-operative program set up in the Savings and Loan and similar institutions. Now in the fifth decade of this century, the country is faced with a similar problem in that vast resources of the people are in foundations and trusts having no regular government or official supervision or examination. (Compare as one example American Foundations and their fields. 1942 Seybold.) So the trusteeships that are thus on the loose today are in free control of many billions of dollars of credit belonging to the people. The Court of Chancery by developing the law of trusteeship as it has done, to be without supervision until complaint is made by someone at court, has set loose in the economy of the country a very great power, an anti-social power. When the court (as the courts below in this case have done), refuses to order the trustee to account and refuses to give the co-operative owner of the fund and consumer beneficiary of the invest-

ment, any right of inquiry or any relief whatever; society generally has great cause for alarm.

The dangers to the people and their money, which lie in this situation, arising from the fact that the law of equity has been created by the courts without periodic supervision or restraint, is in fact causing alarm. Legislation is being proposed to have all trusts, public and private, register and report regularly to some state official. As shown by the *City of Dublin case,* 1 Bligh N.R. 312, elsewhere discussed in this petition, the making and filing of such reports will not, however, solve the problem of supervision, and would not relieve the Court of Chancery from its duty as Paramount Judicial Sovereign, to supervise and control all trusts whenever complaint is made. In the *Dublin* case, pursuant to statutes by Parliament, there were reports made to Parliament. After fifty years it was contended by the City of Dublin and its officials, that those reports established an accounting and consummated an exclusive ownership of the fund by the City of Dublin, and wholly removed all duty and power of the Courts of Chancery to order an accounting and performance of the trust. In that case after a review of the growth of equity, that contention was denied and overruled by the House of Lords in that historic case. 1 Bligh N.R. 312. By this decision of the House of Lords, the economic experiment of the people in consumer cooperation was allowed free play and permitted to prevail in England.

Petitioners respectfully show that the effort by the trustees in the *Dublin* case, after 50 years of operation, to *chill the trust by strong words and bold repudiation,* has been repeated by the respondents at bar and by the courts below. This Supreme Court is now asked by your petitioners to follow the example of the House of Lords; and announce an urgently needed affirmation of the historic principles of equity, by an application to the current co-

operative economy as presented by this record. Thereby you will (1) Sustain a consumer co-operative trust, (2) Restore to the people the sanctity of trusts, and (3) Render inescapable the duty of unfailing loyalty by respondent trustees.

Prayer for Relief on This Petition.

Your petitioners submit that they did not receive *due process* of law nor *equal protection* of the law, in said District and Circuit Court of Appeals in this case. The adverse action by District Court and Circuit Court of Appeals for the Seventh Circuit, is such on this record as to call for review and reversal by the Supreme Court of the United States.

WHEREFORE, petitioners pray the allowance of a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein by said District Court and Circuit Court of Appeals may be reversed, that the trust funds for the consumer financing and beneficial ownership of Street Railways at Chicago may be restored and preserved and for such relief as this Court may direct.

WEIGHTSTILL WOODS,
Counsel for Petitioners.

AUTHORITIES FOR APPELLANTS AND PROPOSITIONS OF LAW.

A-1) The primary duty is obligatory upon courts both state and national, to hear and determine assertions upon the Bill of Rights and other constitutional questions and federal questions, which are presented by the record.

Article VI of the Constitution of the United States, (Second Paragraph).

West Chicago Street Railway Co. v. *Illinois ex rel Chicago,* 201 U.S. 506 at 519-520.

Coombes v. *Getz,* 285 U.S. 434.

Sola Electric Co. v. *Jefferson Co.,* 317 U.S. 173 at 176.

A-2) This suit comes at the foot of decrees entered in the United States District Court (then Circuit Court) at Chicago in the year 1907, (which decrees are contractual in nature) in conformity to mandates from this Supreme Court and the United States Circuit Court of Appeals for the Seventh Circuit. This suit seeks restoration and accounting for funds in trust arising under and supported by said decrees.

Title 28, Sec. 876, Federal Code Annotated.
Tr. 156.

A-3) Upon the offer made by their own ordinances, the defendants voluntarily became trustees, to collect the funds in question, with power and duty to invest only in street railways at Chicago.

New Orleans v. *Warner,* 167 U.S. 467 at 477 and 175 U.S. 120 at 122, 130.

Attorney General v. *Mayor of Dublin,* 1 Bligh N.R. 312 (House of Lords decisions).

The Maccabees v. *City of North Chicago,* 125 F. (2d) 330 at 333.

Town of Aurora v. *C. B. & Q. Ry.,* 119 Ill. 246.

A-4) By payment of two cents or more excess fare for each ride, each plaintiff became an original party in privity with the trust agreement. Said trust establishes a consumer cooperative for street car service. Any beneficiary who is named or who is described in a contract or trust, or who makes contribution to a common fund for a common purpose, may sue to enforce the benefit, whether or not he knew at the time about the transaction, upon whose occurrence the language of the trust agreement, vests in such claimant the benefit.

These are Illinois decisions:

Woolenberger v. *Hoover,* 346 Ill. 511 at 594.

Dean v. *Walker,* 107 Ill. 540 at 545 ff.

Carson Pirie Scott & Company v. *Parrett,* 346 Ill. 252 at 257 ff.

These are Court of Appeals decisions:

American Can Company v. *Garnett,* 279 Fed. 722 at 725.

Commodity Credit Corporation v. *Henwood,* 126 F. 2d 145 at 147 ff.

Ohio Casualty Co. v. *Beckwith,* 74 F. 2d 75 at 78.

These are recent rulings by other courts:

Re Weininger's Estate, 239 Wis. 432; 1 N.W. 2d 880 at 882.

Magna Mfg. Co. v. *Aetna Casualty Co.,* 129 N.J. Eq. 142 at 147.

Bankers Co. v. *Monarch Co.,* 123 West Va. 53 at 61, 14 S.E. 2d 922 at 926.

A-5) There remains vested in each plaintiff as beneficiary an undisputable right to have the trust fund administered, as created in writing and established on February 1, 1907. The meaning of the Constitution is that purchase money and accruing interest are held in trust by the City to accomplish full services and satisfaction to the car-rider.

Conway v. *Cable,* 37 Ill. 82 at 90.
Inhabitants of East Sudbury v. *Belknap,* 18 Mass. 512, 519.
Boston Elevated Ry. Co. v. *Commonwealth,* 310 Mass. 528 at 556.
Barnard v. *City of Chicago,* 270 Ill. 27 at 31.
City of Moline v. *Greene,* 252 Ill. 475 at 480.

The constitution and the commentators emphasize this primary doctrine of American law of property.

(Tr. 47-48.)
Potter's Dwarris on Statutes and Constitution at pages 387, 474.
Pomeroy 5th Edition, Equity, Section 1250, pages 738, 749.

A-6) The defendants are voluntary active trustees of an express trust, assumed by them wilfully, with all obligations incident to private contract and trust relationship. The trust is evidenced by provisions of the Constitution of Illinois herein relied upon, and by municipal ordinances which are described by the complaint. The plaintiffs are beneficiaries of that trust.

Wall v. *Chicago Park District,* 368 Ill. 81 at 91 ff.
Hall v. *State of Wisconsin,* 103 U.S. 5 at 11.
Richmond v. *Irons,* 121 U.S. 27, 55, 56.
Pulsifer v. *Greene,* 96 Maine 438 at 445.
Burnett v. *West Madison State Bank,* 375 Ill. 402, 406.

People v. *Village of Glencoe,* 372 Ill. 280, 282.
Altschuler v. *Chicago City Bank and Trust Company,* 380 Ill. 137, 142.
Cummings v. *Smith,* 368 Ill. 94 at 105, 13 N.E. (2d) 69 at 74.

A-7) The defendants should have performed the trust and they must account for the traction fund which is brought into court by this record. The defendants have received and they hold trust funds, which are applicable to the purchase and upkeep of common transportation services, due to be maintained by the defendants for the use of these plaintiffs, who are beneficial owners of all funds which are described and brought into court by this record.

Complaint in Chancery, Tr. pages 2 ff.

A-8) The constitutional provisions asserted by this suit as sources and confirmation of the trust are mandatory and are self-executing without legislation.

People ex rel Markgraff v. *Rosenfield, Director of Public Works and Buildings,* 383 Ill. .....
People v. *Smith,* 374 Ill. 286, at 288.
People v. *Kelly, Mayor,* 361 Ill. 54 at 59, 60.
People v. *City of Chicago,* 378 Ill. 453 at 458.

A-9) The refusal by the Courts below to hear and pass upon the constitutional matters presented to them by this record was an arbitrary abdication from Judicial duty.

Petition for rehearing (Tr. 120-157), and authorities there mentioned.

A-10) The English cases fully sustain these petitioners.

Charitable Corporation v. *Sutton,* 2 Atk. 400 at 406, (1742).

Thomas Sturge and others v. *The Eastern Union Ry. Co.*, 7 DeGex M. & G. 158, 169, 174 (1855).

Attorney General v. *Mayor of Dublin*, (1827), 1 Bligh N.R. 312. House of Lords decisions.

B-1) The District Court has all power necessary to enforce and to administer this trust. Its power to do so can neither be abridged nor limited by the General Assembly of Illinois.

Illinois State Constitution, Article VI, Paragraph 12.

Rothschild v. *Village of Calumet Park*, 350 Ill. 330, 338.

Black & Yates v. *Mahogany Ass'n*, 129 Fed. (2d) 227 at 233.

B-2) In deference to the constitution as asserted by this suit, and the duties of defendants as trustees, every court of equity will disregard all demands and self-serving suits and documents of purported release asserted by defendants, and will disregard all such suits and purported releases so obtained by defendants.

Campbell v. *Albers*, 39 N.E. 2d 671, 313 Ill. App. 152.

White v. *Sherman*, 168 Ill. 589 at 605, 610.

American etc. v. *City of Avon Park*, 311 U.S. 138 at 145.

Hatch v. *Hatch*, 9 Ves. Jun. 292.

Ingram v. *Lewis*, 37 Fed. (2d) 259 at 263.

Ill. Merchants Trust Co. v. *Harvey*, 335 Ill. 284, 289.

Peter v. *Peter*, 343 Ill. 493 at 500.

Rudin v. *City of Harvey*, 377 Ill. 595 at 601.

Northwestern Yeast Co. v. *City of Chicago*, 301 Ill. App. 303, 309.

Fry v. *Pence*, 261 Ill. App. 218, 232 and 239-240.
McKeon v. *Pridmore*, 310 Ill. App. 634, 647.
Sands v. *Sands*, 112 Ill. 225 at 231.
Restatement of Trusts, Section 217, (b-c-e).
Bogert on Trusts, Section 493.
Scott on Trusts, Section 343.

C-1) The named plaintiffs have the right to file this class suit on behalf of themselves and all other persons in like situation. The named plaintiffs are members of that class of persons who own the trust fund in common in equity and have rights and interests in common. The record presents an appropriate class suit for relief in equity.

Guilfoil v. *Arthur*, 158 Ill. 600 at 605.
Flanagan and others v. *City of Chicago and others*, 311 Ill. App. 135, 157-160 (leave to appeal denied).
Supreme Tribe of Ben Hur v. *Cauble*, 255 U.S. 356, 363.
Boesenberg v. *Chicago Title & Trust Co.*, 128 Fed. (2d) 245, 246.
Haraway v. *Zambie*, 157 S.W. 2d 504.
Hillmer v. *Chicago Bank of Commerce*, 375 Ill. 266 at 268.
39 American Jurisprudence 917, parties section 44 ff.
Site of Fort Dearborn Corporation v. *City of Chicago*, 47 N.E. (2d) 564, 318 Ill. App. 139.

C-2) The complaint in this record states facts, as to diversity of residence and citizenship, for the named plaintiffs and all the defendants, and as to value and amount of property involved, sufficient to vest jurisdiction over a class suit, in United States District Court and this Court.

Boesenberg v. *Chicago Title and Trust Co.*, 128 Fed. (2d) 245 at 246.

Buck v. *Gallagher*, 307 U.S. 95 at 104.
Eresch v. *Braecklein*, 133 Fed. (2d) 12-13.
City of Orangeburg v. *Southern Ry. Co.*, 134 Fed. (2d) 890.

C-3) The court of chancery has inherent and original control over all trust matters. This record shows need for that exclusive remedy against the misconduct of trust matters by the defendants.

These are Circuit Court of Appeals decisions:

The Maccabees v. *City of North Chicago*, 125 F. (2d) 330 at 333.
Black & Yates v. *Mahogany Ass'n.*, 129 Fed. (2d) 227 at 233.
Natural Gas Pipeline Company v. *Federal Power Commission*, (C.C.A.), 128 Fed. (2d) 481 at 486, 487.
City of Jacksonville v. *Bankers Life Co.*, 90 Fed. (2d) 141 at 144.

These are Illinois Supreme Court decisions:

Norton v. *Hixon*, 25 Ill. 371, 373.
(Old edition page 439 at 452).
Mettler v. *Warner*, 249 Ill. 341 at 347.
Davis v. *City of Chicago*, 333 Ill. 422 at 426, 428.
Village of Hinsdale v. *Chicago City Missionary Society*, 375 Ill. 220.
Board of Education of City of Rockford v. *City of Rockford*, 372 Ill. 442.

C-4) By force of constitutional provision, the chancery powers of Courts sitting in Illinois cannot be abridged nor limited by the General Assembly. The purchase price for street railways is a trust res which the District Court has power to enforce and to administer in chancery.

Illinois State Constitution, Article VI, paragraph 12.

Howell v. *Moore*, 127 Ill. 67 at 79.
County of Cook v. *City of Chicago*, 311 Ill. 234 at 237.
Flanagan v. *City of Chicago*, 311 Ill. App. 135.
Rothschild v. *Village of Calumet Park*, 350 Ill. 330 at 338.
Getz v. *City of Harvey*, 118 Fed. (2d) 817, 824 ff.
Hart v. *Central City*, 159 S.W. (2d) 18.
Siefker v. *City of Chicago Heights*, 297 Ill. App. 113 at 117, and cases there cited.

C-6) By their conduct and their manner of defense of this suit, which are in violation of state and federal constitutions (Tr. 47-48), the defendants seek to accomplish direct impairment and departure from the trust relationship with your plaintiffs arising from voluntary contract trust ordinances, under the terms of which the defendants accepted funds and powers and assumed duties for the use and benefit of these plaintiffs.

Wall v. *Chicago Park District*, 378 Ill. 81 at 91 ff.
Kinney v. *Lindgren*, 373 Ill. 415 at 421.
Toman County Treasurer v. *Hotel Corporation*, 381 Ill. 41 at 45.
Constitution of Illinois, Art. 2, Section 14.
Article I, Section 10 and the Fourteenth Amendment to Constitution of the United States.
Murray v. *Village of Skokie*, 379 Ill. 112.

D-1) The trust res at bar has been disguised otherwise concealed by respondents. Plaintiffs should have restoration for all trust money and funds misapplied by the defendants for any purposes not within the language of this trust.

Fichter v. *Milk Wagon Drivers Union*, 382 Ill. 91.
3105 Grand Corporation et als. v. *City of New York, et al.*, 42 N.E. (2d) 475; 288 N.Y. 178.

Haraway v. *Zambie,* 157 S.W. (2d) 504.
Town of Aurora v. *C.B. & Q. Ry. Co.,* 119 Ill. 246.
Kerner v. *Thompson,* 365 Ill. 149 and 293 Ill. App. 454, 460 ff, certiorari denied 305 U.S. 635.

D-2) Full compensation and restoration includes interest for delay and compound interest for abuse of authority.

(Tr. 9, 89; Year 1907 ordinance).
Norfolk and Western Ry. Co. v. *Board of Education of the City of Chicago,* 114 Fed. (2d) 859 at 862.
Seaboard v. *United States,* 261 U.S. 299 at 305.

D-3) The plaintiffs should have relief pendente lite.

The motions for plaintiff for relief *pendente lite* by discovery and accounting, etc., should have been granted by the trial court, and should now be allowed and directed by order from this court.

Sprague v. *Ticonic National Bank,* 307 U.S. 161 at 168.
Warren v. *Palmer,* 310 U.S. 132 at 139.
Board of Commissioners of Vanderburgh County v. *Sanders,* 30 N.E. (2d) 713 at 714, 131 A.L.R. 1048.

D-4) The extent of the duty of defendants to restore the trust fund so that the trust may be performed as the court may direct, is the only issue that the defendants will be heard to contest.

Rudin v. *Village of Harvey,* 377 Ill. 595 at 602.
Getz v. *City of Harvey,* 118 Fed. (2d) 817 at 827.
Earl v. *Picken,* 113 Fed. (2d) 150 at 158-159.

D-5) Corporate Trustees are held to a high degree of fidelity and ability. Municipal authorities who seek this character of responsibility, claiming that they are specially qualified and financially responsible, should be held at least to the same degree of fidelity as other trustees. "Good faith alone will not protect a trustee, but he must also exercise diligence, prudence and absolute fidelity."

In Re Clark's Will, 242 N. Y. S. 210.

Harrison v. *First Wisconsin Trust Co.*, 191 Wis. 23; 209 N. W. 945, 947.

Busby v. *First National Bank of Chicago*, 288 Ill. App. 500, 520; 6 N. E. (2d) 451 at 459.

United States National Bank and Trust Co. v. *Sullivan*, 69 F. (2d) 412 at 415.

Churchill v. *Peters*, 134 Pac. (2d) 841, 847.

D-6) By Statute in Illinois which reenacted an Act of 13 and 29 Eliz. 1568 and 1684, no transaction in Court or outside, aids a fiduciary or binds a beneficiary of trust, no matter how solemnly a release is made, unless and until there has been a prior and complete accounting and disclosure honestly made.

Chap. 59, Section 4, Ill. Rev. Stats. 1939.

White v. *Sherman*, 168 Ill. 589, 605, 610.

Kinney v. *Lindgren*, 373 Ill. 415, 422.

Nonnast v. *Northern Trust Co.*, 374 Ill. 248 at 271.

D-7) Franchise ordinances have not lost their character as contracts. They were recognized and given effect in

Georgia Railway Co. v. *Decatur*, 262 U. S. 432; 67 L. ed. 1065 and *Southern Utility Co.* v. *Palatka*, 268 U. S. 232; 69 L. ed. 930; *State* v. *Mo. Utl. Co.*, 339 Mo. 589; 96 S. W. 2d 607, 614-18; *City of Chicago* v. *Hastings Express Co.*, 369 Ill. 610; *City of Geneseo* v. *Northern Illinois Utilities Co.*, 378 Ill. 506.

D-8) If a case is arbitrarily and capriciously decided, in violation of settled principles of law, or contrary to undisputed facts, though the court so deciding has jurisdiction, the judgment is in violation of due process of law under either the fourteenth or fifth amendments. The United States Supreme Court should and will review and correct the error.

Postal Telegraph Cable Co. v. *City of Newport*, 247 U. S. 464.

Williams v. *Tooke*, 108 F. (2d) 758, 759.

Cities Service v. *Dunlap*, 308 U. S. 208.

D-9) Equity sustains by court action the modern conceptions of property and advancing social organization. The book of chancery is never finished.

30 C. J. S. 331—Equity §12 and authorities there assembled.

First National Bank of Chicago v. *Bryn Mawr Beach Building Corporation*, 365 Ill. 409 at 421.

Warfield-Pratt-Howell Co. v. *Williamson*, 233 Ill. 487, 497 ff.

Argument Upon Constitutional Matters.

Respondents rely upon *Barsaloux* v. *City of Chicago*, 245 Ill. 548 and *People* v. *City of Chicago*, 349 Ill. 504. It is established as fact by the complaint (Tr. 54-55) that those cases and others there analyzed, were mere collusive transactions deliberately undertaken to sabotage the car-riders service trust, without disclosure to the Courts and without making beneficiaries of this trust parties to any of those proceedings. In each of these lawsuits all parties were in common interest on *one side of the record only*. Those cases were pure deceit and shadow boxing. The motion to dismiss in this case at bar, admits that is so.

The futility of the *Barsaloux* line of cases which were collusively foisted upon the courts by the respondents is clearly shown by the reasoning in another Illinois case, *Dudick* v. *Baumann*, 349 Ill. 46 at 49, 50 and 51:

> "The right of a *tax-payer* to prevent misappropriation of public funds has always been recognized by this court on the grounds that in equity tax-payers are considered the owners of the property of the municipality, and whenever public officials threaten to pay out *general public funds* for a purpose unauthorized by law, or misappropriate such funds, and thereby cause taxes to be levied to make good the misappropriation, equity will assume jurisdiction to prevent such unauthorized act, as the tax-payers' right in such case is not recognized by courts at law. (*Fergus* v. *Russel*, 270 Ill. 304; *Jones* v. *O'Connell*, 266 Ill. 443; *Burke* v. *Snively*, 208 id. 328; *Beauchaump* v. *Kankakee County*, 45 Ill. 274; *Colton* v. *Hanchett*, 13 Ill. 615). The interest of the *general tax-payer*, however, must be based upon *the right of the municipality in and to the funds.* Special assessment funds are raised for the purpose of paying for the local improvement. The only interest which the city or village has in such funds, other than the right to be reimbursed therefrom for costs advanced, is to see that they are properly collected and used to pay for the improvement or bonds issued therefor. After the discharge of the expense of the improvement and the cost of collection, the balance, if any, belongs to the property owners against whose property it was assessed and should be returned to them. *Donahue* v. *Village of LaGrange*, 263 Ill. 607.
>
> "Counsel for appellant argues, however, that because there may be a misappropriation of the funds after the same have been collected by the village

officers, for which the village would be liable and the tax-payers taxed, he has an interest as a tax-payer. He also seems to find some interest as a general tax-payer in his claim that Baumann had no right to retain two per cent of the amount of assessments collected. Unless it appears from the bill that the public funds or village liability is in some way affected by such retention a general tax-payer has no such interest as authorizes suit by him. Special assessment funds are trust funds for a specific purpose and are not part of the general revenues of the municipality raised by general taxation. (*Donahue* v. *Village of LaGrange, supra; Conway* v. *City of Chicago,* 237 Ill. 128; *Bradford* v. *City of Chicago,* 25 id. 349.) Under section 12 of article 7 of the Cities and Villages act (Cahill's Stat. 1931, p. 348) all moneys received on any special assessment are required to be *kept in a special fund* to be applied to the payment of the improvement for which the assessment was made, and for no other purpose unless to reimburse the corporation for money expended for such improvement. The mere possibility that under some circumstances the village of Niles Center may be required to make up a deficiency in public funds not shown or alleged in the bill is not sufficient to give appellant the right to maintain a bill in equity on the ground of his *interest as a general tax-payer.* • • • No facts showing such an interest have been alleged in the bill. Appellant is not one of those whose property has been assessed and is therefore not interested in the disposition of the assessments collected, unless a situation arises which would lead to a misappropriation of public funds and necessity for levying taxes to meet obligations of the village because of such misappropriation. He makes no such showing.

"A general tax-payer's right to sue in equity to protect public funds is based on his equitable ownership of such funds and on his liability to replenish the public treasury in case of misappropriation of those funds. Unless he makes such a case by his bill he has shown no right to sue in equity, *Fergus* v. *Russel, supra; Jones* v. *O'Connell, supra; McCord* v. *Pike,* 121 Ill. 288; *City of Chicago* v. *Union Building Ass'n,* 102 Ill. 379; *Merritt* v. *City of Duluth,* 103 Minn. 236."

The paramount dominance of the constitution was stated thus by *Lobdell* v. *City of Chicago,* 227 Ill. 218 at 245:

"This court has nothing to do with the policy of *the municipalization of street railways* in the cities of this State. It is its duty, however, to enforce the provisions of the constitution as it finds them written in that instrument. Section 12 of article 9 of the constitution is a wise provision, and must be enforced and applied by the courts until its provisions are changed by the people in the manner provided in the constitution. In *Dolese* v. *Pierce,* 124 Ill. 140, on page 149, it was said: 'The highest duty and most sacred function of this court is to protect and enforce the constitution, regardless of all real or imaginary inconveniences that may result from doing so.' And in *Village of Hyde Park* v. *City of Chicago,* 124 Ill. 156, on page 163: 'The voice of the people is all-powerful when expressed in pursuance of laws that are passed in obedience to the constitution. But until the people vote to amend or change the constitution in the mode which they themselves have designated, they, as well as their officials, are bound to obey its mandates.'

"The briefs filed in this case are voluminous and the arguments have taken a wide range. As the ques-

tion considered by this opinion is controlling, we have not deemed it necessary to consider herein any of the other questions which have been raised and discussed in the briefs.

"Having reached the conclusion that the proposed issue of $75,000,000 in street railway certificates of the city of Chicago, and the execution of said trust deed or mortgage to secure their payment, will create an indebtedness of the city of Chicago beyond the constitutional limit, the decree of the circuit court will be reversed and the cause remanded to that court, with directions to overrule the demurrer to the bill of complaint.

"*Reversed and remanded, with directions.*"

Upon such reasoning, the dismissal of the *Barsaloux* and like cases is correct. Neither the respondents nor any tax-payer has any equitable right or interest in this trust fund. Petitioners urge also the fact that the car-riders were not parties to those suits, nor were there pleadings nor any arguments in those cases to present their claims and interests in the fund. Petitioners now for the first time seek their day in court on this record, as the exclusive equitable owners of this car-riders-service fund.

In *People* v. *Chicago, Burlington and Quincy Railroad Co., supra*, at page 345 it is held:

"Where a right is asserted against a municipality and a judgment is recovered it is binding on tax-payers although they are required, as individuals, to pay the judgment, but a decree enjoining the collection of a tax to pay a demand against a town in a suit by tax-payers against the town is not *res judicata* against the holder of the demand who is not a party to the suit. (*Town of Lyons* v. *Cooledge*, 89 Ill. 529.) The interest of the holder of the demand is adverse to that of the

town and the taxpayers, and he is not represented by either in a litigation between them. This case does not come within any recognized rule of representation of one not a party to the record."

In the recent case of *Alward* v. *Borah,* 381 Ill. 134, the court quoted from the early case of *Botsford* v. *O'Connor,* 57 Ill. 72 at page 76 where it is said: "It is a principle that lies at the foundation of all jurisprudence in civilized countries, that a person must have an opportunity of being heard before a court can deprive such person of his rights. To proceed upon any other rule, would shock the sense of justice entertained by mankind, would work great wrong and injustice, and render the administration of justice a mere form. Until a person is made a party to a suit, and is afforded a reasonable opportunity of being heard in defense of his rights, a court has no power to divest him of a vested right." This rule has been reaffirmed many times. Your petitioners also rely upon *People* v. *Chicago, Burlington and Quincy Railroad Co.,* 247 Ill. 340, 345; *People* v. *Chicago and Alton Railroad Company,* 247 Ill. 373; *People* v. *Illinois Central Railroad Co.,* 298 Ill. 518, 521; *Town of Lyons* v. *Cooledge,* 89 Ill. 529; *Worley* v. *Idleman,* 285 Ill. 214, 221; and the note following the case of *Lee* v. *Independent School District* (149 Iowa, 345) as reported in 37 L. R. A. (N. S.) 383; *Leininger* v. *Reichle,* 317 Ill. 625; *Heppe* v. *Szczepanski,* 209 Ill. 88.

When the tax-payer is a member of the group who *contributed to the fund,* the tax-payer may complain and will be heard and allowed of right to control the fund. *City of Moline* v. *Greene,* 252 Ill. 275 at 280. It follows inevitably that your petitioners both AS CONTRIBUTORS TO THE COMMON FUND at bar, and as PATRONS AND CONSUMERS OF STREET CAR SERVICE that should have been purchased and provided with that fund, are proper plaintiffs to pursue this suit against unfaithful trustees.

And likewise you have decided recently in *Murdock* v. *Commonwealth of Pennsylvania,* 63 S. Ct. 870 at 875 and 876:

> "As stated by the Supreme Court of Illinois in a case involving this same sect and an ordinance similar to the present one, *a person cannot be compelled 'to purchase,* through a license fee or a license tax, *the privilege freely granted by the constitution.' Blue Island* v. *Kozul,* 379 Ill. 511, 519, 41 N. E. 2d 515, 519. * * *
>
> "It is claimed, however, that the ultimate question in determining the constitutionality of this license tax is whether the state has given something for which it can ask a return. That principle has wide applicability. *State Tax Commission* v. *Aldrich,* 316 U. S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358, 139 A.L.R. 1436, and cases cited. But it is quite irrelevant here. This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. *The privilege in question exists apart from state authority. It is guaranteed the people by the federal constitution.*"

The right of your petitioners to pass over the highways and streets of Chicago freely as pedestrians or in any conveyance they choose to use is a national right guaranteed to them by the Constitution. See page 14 herein.

Record is unlike Police Power Cases.

This case is far removed from the parking meter cases and like rulings under the police power, such as *Andrews* v. *City of Marion,* 47 N. E. (2d) 968, 221 Ind. ....., and many citations there made. The limitations of maximum exercise of the police power are discussed in *Boston Elevated Ry. Co.* v. *Commonwealth,* 310 Mass. 528 at 556, (39 N. E. (2d) 87 at 109) as follows:

"However regulation of the use of the streets may be described, the principles, already stated, supporting the conclusion that the Legislature had power to grant the Atlantic Avenue location and to contract that it should be irrevocable, necessarily support the conclusion that such a grant cannot be revoked, under the guise of regulating the use of the streets, on the ground of expediency, in the interest of the general welfare. See *Grand Trunk Western Railway* v. *South Bend,* 227 U. S. 544, 553-557, 33 S. Ct. 303, 57 L. Ed. 633, 44 L.R.A., N.S., 405; *City of Owensboro* v. *Cumberland Telephone & Telegraph Co.,* 230 U. S. 58, 73, 74, 33 S. Ct. 988, 57 L. Ed. 1389. Compare *New Orleans Public Service, Inc.* v. *New Orleans,* 281 U. S. 682, 685, 686, 50 S. Ct. 449, 74 L. Ed. 1115. See also, *Commonwealth* v. *Strauss,* 191 Mass. 545, 550, 78 N. E. 136, 11 L.R.A., N.S., 968, 6 Ann. Cas. 842; *Smith* v. *New England Aircraft Co., Inc.,* 270 Mass. 511, 522, 523, 170 N. E. 385, 69 A.L.R. 300. 'A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions. * * * Under it there is no unrestricted authority to accomplish whatever the public may presently desire.' *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission,* 294 U. S. 613, 619-622, 55 S. Ct. 563, 566, 79 L. Ed. 1090. As was said by Mr. Justice Holmes, in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 413-416, 43 S. Ct. 158, 159, 67 L. Ed. 322, 28 A.L.R. 1321: 'As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. * * * *We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.*' "

Likewise we read in *Conway* v. *Cable*, 37 Ill. 82 at 90:

> "In all civilized governments, laws impairing the validity of contracts, and divesting the rights of property, are considered unjust and odious. And such enactments never receive such a construction, unless required by the language, when so plain as to admit of no other interpretation. In the case under consideration, the transaction was complete before the law was adopted, and the answer may have relied upon the defects, which are admitted to have existed, but are claimed to have been cured by the act of 22d February, 1861. To give it force, therefore would be to transfer the property of the former owner, not by force of a valid and binding sale for taxes, but by the declared will of the legislature, that his title should pass from him, and vest in the purchaser at a tax sale, which conferred no right. This the legislature have not the power to do, whether by direct and positive action, or by rendering valid and binding acts which were nugatory."

Confirmed by *Drainage District* v. *Soucy*, 292 Ill. 584, and by *City of Chicago* v. *Empire Liquidation Corporation*, 370 Ill. 631.

Error by Courts below is departure from decrees.

In *West Virginia State Board of Education* v. *Barnette*, 63 S. Ct. 1178 at 1184 and 1185: this Supreme Court recently has reaffirmed the constitutional guarantees as follows:

> "Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have

mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

"* * *

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

The foregoing accords with prior law of this case at bar shown at Tr. 138 ff.

Record proceeds at foot of Court decrees.

In the later ruling by this Court at the foot of a prior decree: *Schneiderman* v. *United States,* 63 S. Ct. 1333 at 1335 to 1358, your Honors said:

"We are dealing here with a court decree entered after an opportunity to be heard. At the time petitioner secured his certificate of citizenship from the federal district court for the Southern District of California notice of the filing of the naturalization petition was required to be given ninety days before the petition was acted on (Sec. 6 of the Act of 1906), the hearing on the petition was to take place in open court (Sec. 9), and the United States had the right to appear, to cross-examine petitioner and his witnesses,

to introduce evidence, and to oppose the petition (Sec. 11). In acting upon the petition the district court exercised the judicial power conferred by Article III of the Constitution, and the Government had the right to appeal from the decision granting naturalization. *Tutun* v. *United States,* 270 U. S. 568, 46 S. Ct. 425, 70 L. Ed. 738. The record before us does not reveal the circumstances under which petitioner was naturalized except that it took place in open court. We do not know whether or not the Government exercised its right to appear and to appeal. Whether it did or not, the hard fact remains that *we are here re-examining a judgment, and the rights solemnly conferred under it.*

"* * *

"Mr. Justice Douglas, concurring.

"Immediately we are concerned with only one man, William Schneiderman. Actually, though indirectly, the decision affects millions. If, seventeen years after a federal court adjudged him entitled to be a citizen, that judgment can be nullified and he can be stripped of this most precious right, by nothing more than re-examination upon the merits of the very facts the judgment established, no naturalized person's citizenship is or can be secure. If this can be done after that length of time, it can be done after thirty of fifty years. If it can be done for Schneiderman, it can be done for thousands or tens of thousands of others.

"The effect of cancellation is to nullify the judgment of admission. If it is a judgment, and no one disputes that it is, that quality in itself requires the burden of proof the court has held that Congress intended in order to overturn it. That it is a judgment, and one of at least a coordinate court, which the cancellation proceeding attacks and seeks to overthrow,

requires this much at least, that solemn decrees may not be lightly overturned and that citizens may not be deprived of their status merely because one judge views their political and other beliefs with a more critical eye or a different slant, however honestly and sincerely, than another. Beyond this we need not go now in decision. But we do not go beyond our function or usurp another tribunal's when we go this far."

The case at bar likewise is bottomed upon prior federal judgments and decrees (Tr. 136ff).

EXHIBIT "A"

Matters Collateral to this Litigation. Cases Before and During 1903 Street Railway Reorganization.

Guaranty Trust Co. v. *North Chicago St. Ry. Co.*, 130 Fed. 801.

Blair v. *City of Chicago*, 201 U. S. 400.

North Chicago St. Ry. Co. v. *Chicago Union Traction Co.*, 150 Fed. 612.

Guaranty Trust Co. of N. Y. v. *Chicago Union Traction Co.*, 158 Fed. 913, 158 Fed. 923.

Merchants Loan & Trust Co. v. *Chicago Rys. Co.*, 158 Fed. 923, 928.

City of Chicago v. *Chicago City Ry Co.*, 205 U. S. 549.

Venner v. *Chicago Rys. Co.*, 236 Ill. 349.

Cases Since Current Reorganization Began in 1926.

Chicago Rys. Co. v. *Ill. Commerce Commission*, 277 Fed. 970.

Thatcher v. *Chicago Rys. Co.*, 4 Fed. 2d 63, 297 Fed. 466.

Harris Trust & Sav. Bank v. *Chicago Rys. Co.*, 23 Fed. (2d) 192.

In Re Babcock, 26 Fed. 2d 153; 278 U. S. 615.
Harris Trust & Savings Bank, 39 Fed. (2d) 958.
City of Chicago v. *Harris Trust & Savings Bank*, 40 Fed. 2d 612.
Harris Trust & Sav. Bank v. *Chicago Rys. Co.*, 56 Fed. 2d 942.
Harris Trust & Sav. Bank v. *F. N. Bank and C. C. Ry. Co.*, 17 F. S. 181.
Re Chicago Railways Co., 17 F. S. 187.
Babcock v. *Chicago Rys. Co.*, 325 Ill. 16; 236 Ill. App. 360.

Conclusion for Relief.

Your petitioners submit that they did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Circuit Court of Appeals was such as to call for review and reversal by the Supreme Court of the United States.

WHEREFORE, petitioners pray the allowance of a writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein by Circuit Court for Seventh Circuit may be reversed, and for such relief as this Court may direct.

WEIGHTSTILL WOODS,
Counsel for Petitioners.

Office - Supreme Court, U. S.
FILED
SEP 4 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 259

S. D. TILNEY, W. C. HAM, et al.,
Petitioners,

vs.

CITY OF CHICAGO, a voluntary Municipal Corporation, and Others, Individually and as Trustees,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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Summary of Argument.

A.

THE PLAINTIFFS HAVE NO INTEREST IN THE TRACTION FUND OF THE CITY OF CHICAGO BECAUSE THEY HAVE NOT CONTRIBUTED THERETO, NOR WAS IT ESTABLISHED FOR THEIR BENEFIT BY THE CONTRACTING PARTIES.

The traction fund is composed of 55 per cent of the net receipts of the companies operating street railways in the City of Chicago paid to the city pursuant to the traction ordinances of 1907. The car riders did not contribute directly or indirectly to the traction fund. They merely paid the lawfully established fares to the street railway companies. The street railway companies paid the 55 per cent of the net receipts as compensation for the use of the streets of the city. The car riders have no interest in the compensation so paid.

The only theory upon which the car riders can claim any interest in the traction fund is the third party beneficiary doctrine. This doctrine applies only where the contract to which the plaintiff is not a party affirmatively discloses an intention that the plaintiff is a direct and primary beneficiary. In the case at bar the plaintiffs are not even incidentally benefited.

If plaintiffs feel that the rate of fare which they are called upon to pay is excessive and illegal, their sole remedy is to institute proper proceedings before the Illinois Commerce Commission requesting a reduction in the rate of fare 5-20

B.

THE CASES CITED BY PLAINTIFFS TO ESTABLISH THEIR RIGHT TO MAINTAIN A CLASS SUIT DEAL WITH SITUATIONS WHERE THE PLAINTIFFS OWNED A TRUST FUND IN COMMON WITH OTHERS AND THEREFORE ARE NOT APPLICABLE TO THE CASE AT BAR.

All of the cases cited by plaintiffs involve situations where trust funds were unquestionably involved and where the plaintiffs were unquestionably members of the class of beneficiaries. The holdings in these cases are not disputed, but are considered inapplicable unless plaintiffs can prove that they are beneficiaries of a trust fund held by the defendants 20-21

C.

THE MOTION OF THE PLAINTIFFS FOR RELIEF PENDENTE LITE WAS PREMATURE, PARTICULARLY WITH RESPECT TO AN ALLOWANCE FOR ATTORNEYS' FEES.

In so far as the blanket motion for relief *pendente lite* seeks discovery, it is premature and improper. After the defendant has filed an answer, the Federal Rules of Civil Procedure provide for appropriate and specific motions to discover matter not disclosed by the answer: to-wit, Interrogatories to Parties; Discovery and Production of Documents; and Requests for Admission.

In so far as the motion relates to an allowance of attorneys' fees and expenses of conducting litigation, it is also premature because the allowance of such fees and expenses cannot be made until successful termination of the litigation and the bringing of a fund into the custody of the court..... 21-26

D.

ALL OF THE EXPENDITURES MADE OR PROPOSED TO BE MADE WHICH ARE SPECIFICALLY DESCRIBED IN THE COMPLAINT ARE WITHIN THE PURPOSES PRESCRIBED BY THE FRANCHISE ORDINANCES.

A considerable portion of the complaint is devoted to general allegations which are not proper bases for sustaining this action. The expenditures made or proposed to be made which are specifically described in the complaint are for purposes falling within the terms of the franchise ordinances limiting the use of the traction fund for the purchase and construction of street railways. The Supreme Court of Illinois has held that these purposes embrace the purchase and construction of surface, elevated and underground street railways and preliminary and incidental work in connection with actual or proposed purchase and construction. The expenditures specifically complained of fall within the scope of permissible expenditures 26-28

CONCLUSION.

The named plaintiffs do not possess a *bona fide* interest in the traction fund of the City of Chicago. The suit was undoubtedly conceived and brought by the attorney for the plaintiffs for the purpose of manufacturing a basis for a claim for attorneys' fees in the remote contingency of success in proving alleged misappropriations 29

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 259

S. D. TILNEY, W. C. HAM, et al.,

Petitioners,

vs.

CITY OF CHICAGO, a voluntary Municipal Corporation, and Others, Individually and as Trustees,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The respondents, City of Chicago, *et al.*, oppose the petition for certiorari on the following grounds:

THE CONTESTED ISSUES.

The contested issues in this case are:

(1) Whether plaintiffs herein, named, or unnamed, have any interest in the traction fund of the City of Chicago to maintain an action at law or in equity.

(2) Whether the expenditures specifically charged in the complaint constitute a misapplication of moneys in the traction fund.

(3) Whether plaintiffs' motion for relief *pendente lite* is proper in any event.

(4) Whether the Federal Courts should entertain this suit which presents issues of purely local concern that only the State courts can definitely decide.

PROPOSITIONS OF LAW RELIED ON AND CITATION OF CASES.

A.

The plaintiffs have no interest in the traction fund of the City of Chicago because they have not contributed thereto nor was it established for their benefit by the contracting parties.

Price v. City of Mattoon, 364 Ill. 512, 515.

Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 257, 258, 178 N. E. 478.

Venner v. Chicago City Railway Co., 236 Ill. 349, 363, 86 N. E. 266, 271.

Barsaloux v. *City of Chicago,* 245 Ill. 598.

People v. *City of Chicago,* 349 Ill. 304, 343.

Root v. *City of Saratoga Springs,* 218 N. Y. S. 204, 206; 218 A. D. 237.

Electric Supply Co. v. *City of Muskogee,* 171 Okla. 130, 42 P. (2) 140.

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In Re Gubelman, 13 Fed. (2) 730, 731.
Dudick v. *Baumann,* 349 Ill. 46, 49.
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Warner v. *New Orleans,* 167 U. S. 467; (distinguished).
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Altschuler v. *Chicago City Bank & Trust Co.,* 380 Ill. 137, 43 N. E. (2) 673; (distinguished).
Hall v. *State of Wisconsin,* 103 U. S. 105; (distinguished).
Wall v. *Chicago Park District,* 378 Ill. 81; (distinguished).

B.

The cases cited by plaintiffs to establish their right to maintain a class suit deal with situations where the plaintiffs owned a trust fund in common with others and therefore are not applicable to the case at bar.

(See argument.)

C.

The motion of the plaintiffs for relief pendente lite was premature particularly with respect to an allowance for attorneys' fees.

People v. Holten, 304 Ill. 394, 399.

Buell v. Kanawha Lumber Corp., 201 Fed. 762, 769.

Blacker v. Kitchen Brothers Hotel Company, 133 Neb. 66, 273 N. W. 838.

Federal Rules of Civil Procedure, Rules 33, 34, 36, 37.

Carbon Steel Co. v. *Slayback,* 31 Fed. (2) 702 (C. C. A. Fourth Circuit).

Becht v. *Miller,* 279 Mich. 629, 637, 273 N. W. 297.

In re Lear's Estate, 204 Ia. 346; 312 N. W. 244.

Warren v. *Palmer,* 310 U. S. 132 (distinguished).

Board of Commissioners of Vanderburgh County v. *Sanders,* 30 N. E. (2) 713 (distinguished).

D.

All of the expenditures made or proposed to be made which are specifically described in the complaint are within the purposes prescribed by the franchise ordinances.

Barsaloux v. *City of Chicago,* 245 Ill. 598.

People v. *City of Chicago,* 349 Ill. 304.

ARGUMENT FOR APPELLEES.

A.

The plaintiffs have no interest in the traction fund of the City of Chicago because they have not contributed thereto nor was it established for their benefit by the contracting parties.

The entire case rests upon the construction and effect of two paragraphs of the traction ordinances of 1907 which admittedly constitute contracts between the City of Chicago and the various traction companies operating as the Chicago Surface Lines. These paragraphs appear at page 8 of the transcript and are quoted at page 9 of the Petition for Writ of Certiorari. For the convenience of the Court and for a ready understanding of the argument to follow, we repeat these two paragraphs at this point:

> "Division of Remaining Net Receipts.
>
> After the deduction from the gross receipts of the items hereinbefore in this section provided, the amount remaining shall be considered as the net receipts for such year arising from the operation of the street railway system hereby authorized, and shall be divided between the Company and the said City in the following proportions: forty-five (45) per cent to be retained by the Company and fifty-five (55) per cent to be paid forthwith by the Company to the said City, crediting thereon all amounts paid out during the preceeding year by the Company for license fees, if any, exacted from the Company and employes.

> "It is further provided that, subject to the action of the City Council of said City, the said City shall deposit the amount so paid to the said City to the credit of a separate fund to be kept and used for the purchase and construction of street railways by said City; but any failure to comply with this provision shall in no way affect the rights or obligations of the Company under this ordinance."

It is to be observed that under these provisions of the ordinances the fifty-five per cent of the net receipts from the operation of the street railway system is agreed to be paid by the traction companies. The car riders are not obligated to pay these moneys and it is undisputed that they did not pay the same. The only contention which is made by the plaintiffs is that indirectly and remotely part of the fares paid by the plaintiffs to the companies found their way into the traction fund.

It is further to be observed that the only conditions attached to the creation of this fund are that it is to be kept in a separate fund and used for the purchase and construction of street railways by the city. The car riders who compose the class on behalf of whom the complaint in this case is filed are not named or described in the ordinances nor are the provisions of the ordinances relating to the traction fund expressly or impliedly made for the benefit of the car riders.

The nature of the traction fund and the scope of the purposes for which it may be used may be gathered from decisions of the Supreme Court of Illinois construing the provisions of the ordinances and from pertinent statutory provisions. In *Barsaloux* v. *City of Chicago,* 245 Ill. 598 the court in construing the words "purchase and construction of street railways" as used in the franchise ordi-

nances held that "street railways" properly construed mean elevated, surface or underground railways and that accordingly there was no valid objection to using the traction fund for the purpose of acquiring or constructing subways in the streets of the city. It was further held that the power to construct necessarily includes the power to take the preliminary steps looking toward a construction of the subway. In that case expenditures for investigations into the desirability of constructing subways was under attack.

In *People* v. *City of Chicago,* 349 Ill. 304, the Supreme Court of Illinois again had occasion to consider the provisions of the franchise ordinances relating to the traction fund. In that case the validity of the comprehensive traction ordinance passed in 1930 was attacked. Section 9 of the ordinance permitted the use of the traction fund for the construction of the contemplated subways. (See page 343.) The court held that this use of the traction fund was proper, not only upon the strength of the decision in *Barsaloux* v. *City of Chicago,* 245 Ill. 598, but also by virtue of section 4 of the Subway Act (Ill. Rev. Stats. 1941, chap. 24, sec. 70-4) which expressly authorizes the use for subway purposes of special funds accumulated from money received by the municipality from street railroad companies.

The claim of ownership of the moneys in the traction fund forms the basis of the entire argument of the petitioners. This premise, however, is nowhere proved by the facts or by citation of authority construing similar provisions in ordinances or other agreements. It appears clearly, however, from a reading of the provisions of the ordinances that this premise is utterly without foundation.

The assertion of ownership by the car riders in this fund appears to be in defiance of fundamental principles relating to third party beneficiaries under contracts.

It is undisputed that the plaintiffs are not direct parties to the franchise ordinances establishing the traction fund. Plaintiffs necessarily must and do rely upon the third party beneficiary doctrine to assert an interest in the performance of the pertinent provisions of the ordinances (see Petition for Writ of Certiorari, page 38 under Point A-4).

An examination of the cases delineating the scope of this principle reveals that the plaintiffs, if they have any interest at all, are benefited so remotely that they do not fall within the doctrine permitting suit by a stranger to the contract.

To begin with, it is axiomatic that strangers to a contract cannot sue for a breach thereof where the contract is not made for their express benefit.

> *Root* v. *City of Saratoga Springs,* 218 N. Y. S. 204, 206; 218 A. D. 237.
> *Electric Supply Co.* v. *City of Muskogee,* 171 Okla. 130, 42 P. (2) 140.
> *Styles* v. *Long Co.,* 70 N. J. L. 301; 57 Atl. 448.

The determination of whether the contract is made for the benefit of a third party so as to entitle him to bring suit is made in conformity with the following principles accepted by both Illinois and Federal Courts:

In *Carson Pirie Scott & Co.* v. *Parrett,* 346 Ill. 252, 178 N. E. 478, the Supreme Court of Illinois said (p. 257):

> "The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him

arising from the contract; if incidental he has no right of recovery thereon. * * *

"The rule is, that the right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, and this liability must affirmatively appear from the language of the instrument when properly interpreted and construed." (p. 258.)

The foregoing principles were approved in *In re A. C. Becken Co.*, 75 Fed. (2) 681, 685. See also to the same effect, *In re United Cigar Stores Co.*, 70 Fed. (2) 313 and *In re Gubelman*, 13 Fed. (2) 730.

In the last cited case the court said (p. 731):

"* * * it must appear that the parties intended to recognize the third person as the primary party in interest. It is insufficient if the third person is a mere beneficiary, having no direct interest in the performance of the stipulations of the parties."

Illustrative cases involving contracts between municipalities and a second party where incidental third party beneficiaries were denied the right to sue are:

Root v. *City of Saratoga Springs*, 218 N. Y. S. 204, 206; 218 A. D. 237.

The court held that a pedestrian injured by failure of the city to perform its contract with a property owner to care for sidewalks could not sue as a third party beneficiary.

Styles v. *R. Long Co.*, 70 N. J. L. 301; 57 Atl. 448.

It was held that where the defendant contracted with the county authorities to provide and maintain a bridge, a member of the public using the bridge was only incidentally benefited by the contract and could not sue the

defendant for alleged negligence amounting to a breach of contract.

Electric Supply Co. v. *City of Muskogee,* 171 Okla. 130; 42 P. (2) 140.

The defendant municipality had an agreement with a building contractor whereby the city agreed to pay the contractor for material used and work done. It was held that a subcontractor had no right under the third party beneficiary doctrine to sue the city for materials furnished.

In the foregoing discussion it is assumed for the purpose of argument that the provisions of the ordinances creating the traction fund are for the incidental benefit of the plaintiffs. Actually such is far from the case, and the real objection to the present suit is that the plaintiffs do not have any interest whatsoever in the traction fund and are not even incidental beneficiaries. Under the terms of the ordinance the traction fund is to be "kept and used for the purchase and construction of street railways by said city." This provision is clearly for the mutual benefit of the contracting parties. The only interest of the riding public in the street railway system whether owned by private companies or by the city is to secure adequate service at reasonable rates.

Since the case at bar purports to be a representative suit seeking relief based upon alleged misappropriation of funds, taxpayers' suits to enjoin a misappropriation of funds or to compel an accounting of public funds are analogous and the principles obtaining in such suit are applicable here. A very instructive case is *Dudick* v. *Baumann,* 349 Ill. 46. In that case a general taxpayer of the Village of Niles filed a suit seeking, among other relief, an accounting by the Village Collector of certain fees he had

deducted from assessments collected pursuant to proceedings under the Local Improvement Act. No showing was made that the plaintiff was the owner of property assessed in any of the proceedings. A decree dismissing the complaint on the ground that the plaintiff could not show any interest in these funds was affirmed by the Supreme Court of Illinois.

In its opinion the court enunciated the following principles which are equally applicable to the case at bar (p. 49):

> "The right of a tax-payer to prevent misappropriation of public funds has always been recognized by this court on the grounds that in equity tax-payers are considered the owners of the property of the municipality, and whenever public officials threaten to pay out general public funds for a purpose unauthorized by law, or misappropriate such funds, and thereby cause taxes to be levied to make good the misappropriation, equity will assume jurisdiction to prevent such unauthorized act, as the tax-payers' right in such case is not recognized by courts of law. (*Fergus* v. *Russel,* 270 Ill. 304; *Jones* v. *O'Connell,* 266 *id.* 443; *Burke* v. *Snively,* 208 *id.* 328; *Beauchamp* v. *Kankakee County,* 45 *id.* 274; *Colton* v. *Hanchett,* 13 *id.* 615.) The interest of the general tax-payer, however, must be based upon the right of the municipality in and to the funds. Special assessment funds are raised for the purpose of paying for the local improvement. The only interest which the city or village has in such funds, other than the right to be reimbursed therefrom for costs advanced, is to see that they are properly collected and used to pay for the improvement or bonds issued therefor. After the discharge of the expense of the improvement and the cost of collection, the balance, if any, belongs to the property owners against whose property it was assessed and should be returned to them. *Donahue* v. *Village of LaGrange,* 263 Ill. 607.
>
> "* * * The general rule is that a bill of complaint must show that the complainant has an interest in the

> subject matter of the suit. A mere contingent or possible interest, or probability of future interest, is insufficient. (*Green* v. *Grant,* 143 Ill. 61; I Puterbaugh's Ch. Pl. (7th ed.) p. 75; 10 R. C. L. sec. 173.) No facts showing such an interest have been alleged in the bill. Appellant is not one of those whose property has been assessed and is therefore not interested in the disposition of the assessments collected, unless a situation arises which would lead to a misappropriation of public funds and necessity for levying taxes to meet obligations of the village because of such misappropriation. He makes no such showing."

So it is here. Plaintiffs, as car riders, have no interest in the fund. They are not contributors to that fund. All that they have done is to pay fares established by law through the instrumentality of the Illinois Commerce Commission. (*Chicago Railways Co.* v. *City of Chicago,* 292 Ill. 190.) They are in no position to question the expenses of operation of those companies, one of the items being the payment of fifty-five per cent of the net receipts to the city. The traction fund was not created for the benefit of the plaintiffs. The disbursements of the monies in that fund could not possibly affect the plaintiffs. It could not affect the rate of fare which they would be required to pay in the remote contingency that they might return to the city in the future and have occasion to use the street cars.

Closely analogous to the case at bar is *Price* v. *City of Mattoon,* 364 Ill. 512. In that case a taxpayers' suit was filed to restrain the City of Mattoon and others from financing and constructing a water works purchase-and-improvement program instituted by the municipality. The cost of the water works was to be paid solely out of revenue from the sale of water. The plaintiffs were users of water and the money they paid would therefore automatically be used

to pay the bonds. This is similar to the instant situation where the fares paid by the car riders indirectly find their way into the traction fund to be used for the purchase and construction of street railways. The court held that under these circumstances plaintiffs failed to show an interest entitling them to question the accounts of the municipality (p. 515):

> "Aside from the fact that plaintiffs, as taxpayers, have failed to make out a case cognizable in a court of equity, they have also failed to show by their amended complaint any other ground for equitable interference. Should plaintiffs as water users, aside from their status as tax-payers, fail to pay the established water rates fixed by the city from time to time and be deprived of water service, no especial injury or interest is established at this time due to any apprehension or anticipation that such an event will occur. Their amended complaint fails to contain any allegations of water rates determined by the city. No failure to pay any existing rate is asserted. The city is not shown to have shut off or threatened to shut off the water from their property. As their rights as water users are purely contractual, they can avail themselves of adequate remedies at law if and when their conjectured injuries materialize."

This decision supports the assertion which we have heretofore made that the present situation resolves itself into two distinct contractual relations—one between the traction companies and the city in which the plaintiffs have no concern and the second between the traction companies and the plaintiffs relating to the payment of the fare and the contract of carriage. If plaintiffs feel themselves aggrieved concerning the rate of fare which they are called upon to pay, their sole remedy is to institute proper proceedings before the Illinois Commerce Commission requesting a reduction in the rate of fare. They have no more right to seek relief from the city on the ground that

they have allegedly been overcharged in the matter of paying fares than they have to demand an accounting from the federal government because of income taxes paid by the traction companies or to demand an accounting from the County of Cook because of property taxes paid or to demand an accounting from other creditors of the traction companies because of monies received by them from the traction companies.

In the final analysis, the fifty-five per cent net receipts is simply compensation paid to the City of Chicago for the use of its streets by the traction companies. The Supreme Court of Illinois has squarely so held in *Venner* v. *Chicago City Railway Co.*, 236 Ill. 349, 363; 86 N. E. 266, 271. A special federal court in this circuit consisting of Evans and Page, Circuit Judges and Carpenter, District Judge, has also so held. (*Chicago Railways Co.* v. *I. C. C.*, 277 Fed. 970, 979.) It has also been so held by the District Court for the Northern District of Illinois, Eastern Division, in *Harris Trust & Savings Bank* v. *Chicago Railways Co.*, 39 Fed. (2) 958. These authorities completely refute the assertion made by petitioners on page 14 of their petition that the city as a municipality gave no consideration for the fifty-five per cent fund because of the various deductions provided for before determination of the "net receipts." We do not quite understand the purpose of the petitioners in making this assertion, but in any event it is unfounded.

It is difficult to understand the theory upon which a patron of a public utility can claim an interest in compensation paid by the utility to a municipality as compensation for the use of its streets. Certainly if the compensation went into the general funds of the city, plaintiffs could claim no interest. An interest is not created

merely because the city agreed to a limited use of that compensation unless it can be shown, which cannot be done here, that a direct benefit to the patrons of the traction companies was intended.

There are no authorities cited in petitioners' brief to support the essential propositions of law asserted by them or which refute the principles laid down by the authorities hereinabove cited by us. Thus, the first main point made by petitioners at page 40 of their brief is that the defendants have received and hold trust funds for the use of the plaintiffs who are beneficial owners of these funds. No authorities are cited to support this assertion which goes to the very heart of the action. As we have already pointed out the plaintiffs herein, named or unnamed, have made no contribution to the traction fund and are not parties to any contract directly or indirectly making them beneficiaries of the monies in that fund.

A second point made by petitioners at page 37 of their brief is that the defendants voluntarily became trustees to collect the funds in question with the power and duty to invest only in street railways at Chicago. We may concede for the purpose of argument, that the traction fund is a trust fund in the sense that the monies are to be used only for the purposes prescribed by the franchise ordinances. This concession does not, however, establish the plaintiffs as beneficiaries of the trust fund nor does it establish the right of the plaintiffs to enforce the performance of whatever duties the city may have assumed with respect to that fund. The cases cited by the petitioners in support of this point (brief, pp. 37-38) present situations where the plaintiffs therein were clearly beneficiaries by virtue of express agreement or statute.

Warner v. *New Orleans,* 167 U. S. 467 and the same case upon a second appeal, *New Orleans* v. *Warner,* 175 U. S. 120, presents the ordinary case of a suit by a holder of warrants issued to anticipate the collection of and payable out of assessments levied against property to cover the cost of a drainage project. It is fundamental that in such cases the municipality is a trustee of the assessments when collected for the purpose of satisfying to the limits of the fund the direct contractual obligations to the holders of the warrants issued by the municipality. In the case at bar there exists no contractual obligation direct or otherwise between the City of Chicago and the plaintiffs.

The case upon which petitioners relied very heavily below and discussed and cited repeatedly in their petition and brief here is *Attorney General* v. *Corporation of Dublin,* 1 Bligh, New Reports, House of Lords, 312. This case is clearly of no value in determining the issues involved herein. It appears from the lengthy report of this case that pursuant to statute the Corporation of Dublin was given the right to charge land owners fixed annual water rates or rents. The corporation was empowered to borrow money and to pledge the rents for repayment of the money. Provision was made in a subsequent statute for further borrowings and for the setting up of a sinking fund to pay off all loans. Apparently when all monies were repaid the levy of water rates was to cease (see pp. 339, 348-349). Upon this state of facts it is not surprising that the court held that the land owners who paid the water rates were entitled to an accounting upon a specific showing in their complaint that the officials of Dublin were not applying the funds in liquidation of the debt as they were bound by law to do. Unlike the plaintiffs in this case the property owners were direct contributors to the fund and

were vitally interested in the disbursements made because upon extinction of the debt the water rates would cease. We fail to see the remotest analogy to the instant case. Neither by direct contribution nor by contract have plaintiffs established any interest in the fund, nor can they show how their rights are affected in any way by the disbursement of the monies in the traction fund.

A third point asserted by petitioners at page 39 of their brief, is a reiteration of the assertion that the defendants are active trustees of an express trust and that the plaintiffs are beneficiaries of that trust. The cases cited on pages 39 and 40 appear woefully insufficient to support this point or strangely irrelevant. *Altschuler* v. *Chicago City Bank & Trust Co.*, 380 Ill. 137, 43 N. E. (2) 673, involved an express written trust agreement, the beneficiaries being the holders of beneficial interests and the trustee being the holder of the title to real estate acquired by foreclosure for the benefit of the bondholders. We can have no quarrel with the holding of the court that the defendant was an active trustee under those circumstances. Any other holding would have been strange indeed. Any similarity between that case and the case at bar escapes our careful attention.

Hall v. *State of Wisconsin*, 103 U. S. 105, holding that a contract between officials of the state and private persons is binding upon the state is clearly not in point. The same comment applies to *Wall* v. *Chicago Park District*, 378 Ill. 81. In the first place no contract exists between the City of Chicago and the plaintiffs herein and secondly there is no question of contractual impairment of a contract by reason of any act of the legislature of the state or of the City Council of the City of Chicago.

A fourth point made by the plaintiffs, at page 38 of their brief, is that any beneficiary who is named or described in a contract or trust agreement or who makes contributions to a common fund may sue to enforce the benefit whether or not he knew at the time about the transaction upon whose occurrence the language of the trust agreement vests in him the benefit and that by payment of two cents or more excess fare for each ride each party became an original party in privity in this street railway trust.

The difficulty with this assertion is that it is not based upon the facts in this case but proceeds upon the unfounded assumption of legal principles upon the facts which are present in the case. The first fallacious assumption of fact is that the case involves a beneficiary who is named or described in a contract or trust agreement. The plaintiffs cannot point to any place in the two paragraphs of the franchise ordinances which are involved herein where the plaintiffs are named or described. The second fallacious assumption of fact is that the plaintiffs have made contributions to a common fund. As we have already pointed out, plaintiffs did not make any contributions to this fund. They merely paid fares to the traction companies and the traction companies pursuant to their agreement with the City of Chicago paid as compensation for the use of the streets the monies set aside in the traction fund. The third fallacious assumption of fact is that the plaintiffs paid two cents or more excess fare for each ride. The rate of fare of the Chicago Surface Lines is legally fixed by order of the Illinois Commerce Commission and it cannot be argued with any plausibility that any fare legally established by law is excessive to any extent. Furthermore there is an inherent fallacy of law in the

assertion that by the payment of the alleged excess fare, plaintiffs acquired a right to follow those fares into the hands of creditors of the public utility to whom monies were paid in fulfillment of a contractual obligation. It is so elementary as to require the citation of no authority that a patron of a public utility who has paid an illegally exacted charge is limited to a suit against the utility to recover the illegal charge.

The cases which the plaintiffs cite presumably in support of this point, which we have just dissected, and which is self-destructive, appear on page 38 of the petitioners' brief. All of these cases announce the indisputable principle that a third party for whose benefit a contract is made may sue to enforce the contract. None of these cases presents facts at all similar to the case at bar and do not in any way support the premise upon which the plaintiffs' case rests. The contract ordinance does not mention the car riders expressly or inferentially and does not purport to be for their benefit.

A fifth point made by plaintiffs at page 39 of their brief, asserts constitutional rights of the plaintiffs and the cases cited in support of the point also consider constitutional questions. We have carefully read the cases cited and cannot discover their relevance to the issues at bar.

There is here involved neither an express trust in favor of plaintiffs nor an impairment by legislation of a contract between the plaintiffs and the defendants, nor a taking of plaintiffs' property by exercise of the power of eminent domain. We believe that any detailed discussion of these cases would be an imposition upon the court.

B.

The cases cited by plaintiffs to establish their right to maintain a class suit deal with situations where the plaintiffs owned a trust fund in common with others and therefore are not applicable to the case at bar.

Plaintiffs cite a number of cases regarding the right of persons to bring representative suits on behalf of themselves and other beneficiaries to a common trust fund (page 42). We do not dispute the holdings in these cases wherein trust funds were unquestionably involved and where the plaintiffs were unquestionably members of the class of beneficiaries. However, plaintiffs could have more profitably devoted their energies in an attempt to prove the essential premise that they are beneficiaries of the traction fund. It is to be observed that nowhere do they claim that they are entitled to receive any portion of that fund. Under no circumstances is the city required to pay to the car riders or to any other group of persons any portion of the traction fund. That fund is to be expended for the purposes specified in the ordinance. That is the limit of the duties of the city. In all the cases upholding the right to bring a representative suit the plaintiffs are suing to recover monies from the trust fund which trust fund is insufficient to pay all claims against it or to enjoin the disbursement of monies from a fund where wrongful disbursement will ultimately result in the imposition of a liability upon the plaintiffs to replenish that fund or other funds. The case at bar does not even remotely bear any resemblance to the usual class suit.

We believe that it is unnecessary to burden the court with a discussion of the right of the plaintiffs to bring a

representative suit because that question cannot possibly arise unless the plaintiffs have first established an interest in the fund and a right to bring an action on their own behalf. This, we submit the plaintiffs have wholly failed to establish.

C.

The motion of the plaintiffs for relief pendente lite was premature particularly with respect to an allowance for attorneys' fees.

Plaintiffs filed a blanket motion for the granting of the special relief *pendente lite* asked for by several of the prayers in the complaint. (Tr. 101.) Prayers for relief are found at pages 61 to 65 of the transcript. It is not entirely clear from reading these prayers which are considered by the plaintiffs as relief *pendente lite.* We presume that these embrace the temporary injunction, discovery and "such advance sums of money as the court may deem necessary, to enable the plaintiffs and their counsel, to make adequate searches and investigations and preparation for trial, and to have the assistance and advice of auditors, before the hearing of this cause." (Tr. 62, 64.) The trial court did not specifically deny this motion. The motion automatically fell when the court sustained the defendants' motion to dismiss the complaint. While it is doubtful whether or not the matter is properly before this court for review at this time since the trial court did not pass upon the motion for relief *pendente lite,* we shall undertake to discuss this motion for the enlightenment of the court since the petitioners have raised the point (page 45).

The three cases which plaintiffs cite in support of their point that the plaintiffs should have relief *pendente lite* are not very helpful.

The relevancy of *Sprague* v. *Ticonic National Bank,* 307 U. S. 161 on the point of relief *pendente lite* escapes us.

Warren v. *Palmer,* 310 U. S. 132 relates to the determination of a lien against property being administered by the court and does not appear to be relevant upon the facts. Apparently the case is cited because of the language of the court that courts having custody of property have the power to require that expenses which "have contributed either to the preservation or creation of the fund in its custody shall be paid before a general distribution among those entitled to receive it." There is no disputing that principle. However, that language does not support the plaintiffs' contention that they are entitled to those expenses *pendente lite* before they have brought the fund into the custody of the court. We will shortly demonstrate that until the fund is brought into court, there is no jurisdiction to award attorneys' fees or expenses incurred in creating the fund.

Board of Commissioners of Vanderburgh County v. *Sanders,* 30 N. E. (2) 713 bears upon the question of relief *pendente lite* only in so far as it relates to an order upon the defendants to furnish the clerk of the court a list of persons who had paid building permit fees and the amount of fees paid by them, the recovery of those fees being the object of the suit. We do not question that if plaintiffs in this case have the right to maintain the present action, they will be entitled to discovery under the Federal Rules of Civil Procedure by appropriate and specific motions. (Rule 33—Interrogatories to Parties; Rule 34—Discovery and Production of Documents; Rule 36—Request for Ad-

mission; and Rule 37—Refusal to Make Discovery: Consequences.) If it was the intention of plaintiffs to obtain such relief *pendente lite* by their blanket motion, we submit that the motion was both improper and premature. Reasonably the plaintiffs must await the answer of the defendants to determine what information the plaintiffs desire that is not furnished by the answer of the defendants and then proceed by appropriate specific motions under the above cited rules. These specific motions could then be intelligently considered by the trial court. A vague motion for relief *pendente lite* without specifying what relief is requested presents nothing upon which the trial court can pass and cannot be regarded as a proper procedure under the rules.

In so far as the motion relates to an allowance of attorneys' fees and expenses of conducting litigation, it is manifestly premature. *People* v. *Holten,* 304 Ill. 394 squarely decides that point. In that case a taxpayer's suit was brought to recover from the collector of the town of East St. Louis certain taxes collected by him. The trial court dismissed the complaint. Upon appeal to the Supreme Court the decree of dismissal was reversed and the cause remanded. Upon remandment and before any other proceedings were had the attorney for plaintiffs filed a petition for allowance of fees and for a lien upon the fund when collected. The petition for fees was dismissed and an appeal was taken to the Supreme Court. The action of the trial court was affirmed, the Supreme Court holding that until successful termination of the suit and the bringing of the fund into the custody of the court there cannot be an allowance of fees (page 399):

> "Had there been a judgment or decree recovering this fund there would be much force in counsel's argument. A court of equity should do all in its power

to reasonably compensate those who seek to protect the public by compelling the return of public funds. There is no provision in equity, however, permitting a court, in the exercise of equitable powers, to declare an allowance of fees and the payment of them out of a fund of this character before the fund comes under the control of the court. There has been no judgment or decree rendered in the main case finding any amount due from Holten and his bondsmen. It was held in the *Holten* case that a right of recovery existed by the action of the tax-payers; that on the record there made Holten and his bondsmen were shown to be liable; that the municipalities had no authority to settle the claims with Holten and his bondsmen as was attempted to be done, and that therefore it was error to dismiss the bill. This does not amount to a judgment or decree finding an amount due. The case was remanded without directions. This opened the case for pleading, if desired. (*Green Lumber Co.* v. *Nutriment Co.*, 224 Ill. 234.) We are unable to say now that the circuit court should, on remandment, have entered a judgment or decree finding an amount due. There is no such fund at this time in the control of the court from which an allowance of reasonable attorney's fees could be made."

The federal rule is in accord with the foregoing principles. In *Buell* v. *Kanawha Lumber Corp.*, 201 Fed. 762 the court considered the question of allowance of attorneys' fees by courts of equity from a fund brought into court through the efforts of representatives of a class. While the decision is that of a district court, it is so painstaking and scholarly that we have no hesitation in submitting it to the court as sound authority. In its opinion, the court said, page 769:

"In America no distinction as between solicitors and barristers existing, the doctrine has been extended so as to include all the fees and expenses reasonably due by the successful litigant to his counsel, and the rule is established that where one goes into a court of

equity, and takes the risk of litigation on himself, and successfully creates or preserves or protects a fund to a share in which others are entitled, those others will not be allowed to lie back and share the results of these successful labors without contributing their due share, and a court of equity by an equitable extension of the English principle has required the payment out of the fund (before distribution) of the reasonable costs and expenses, including the reasonable counsel fees of the complainant whose diligence created or preserved the fund for distribution. If the complainant had been unsuccessful, and no fund had been created, he would have had to undergo the fate of the unsuccessful litigant in any other proceeding; that is, to pay the costs and expenses himself. That is the burden and risk that every litigant takes when he enters a court of justice. If unsuccessful, he must pay the costs of the court and also his own counsel fees. No man will be compelled to pay that which he did not expressly or impliedly contract under such circumstances to pay, and, if the complainant be unsuccessful, he cannot call upon others who did not believe in the merit of the claim, or did not care to undertake the risk of litigation, to pay any part of these expenses. He must bear them all himself. So, in any court of equity in the United States, where the complainant fails in his application, he has to pay all the costs of court, including the fees of the officers of the court, and of the masters and examiners as well as his own counsel fees. If successful, and through his efforts a fund has been created and protected or preserved, the court will under the principle of requiring equity to be done by those who share in these results require payment of all proper expenses out of the fund, if any fund there be within the court applicable to them."

The foregoing case has been cited with approval and quoted from by many courts of review. Some of these are: *Carbon Steel Co.* v. *Slayback,* 31 Fed. (2) 702 (C. C. A. Fourth Circuit); *Becht* v. *Miller,* 279 Mich. 629; 273 N. W. 297; *In re Lear's Estate,* 204 Ia. 346; 312 N. W. 244; and

Blacker v. *Kitchen Brothers Hotel Company,* 133 Neb. 66; 273 N. W. 838.

In the last cited case the syllabus by the court reads:

> "3. But allowances for attorneys' fees and expenses in such cases [representative suits] can only be made after the services have been rendered and a determination made that they were of direct and substantial benefit to other members of the class who are alleged to have benefited therefrom."

The foregoing authorities are so conclusive on the point that we will not further belabor it. There is no authority in law or reason for compelling a defendant *pendente lite* to finance litigation against him. All that can reasonably be expected is that after the plaintiffs have successfully maintained and terminated their action and have established the liability of the defendant, they are entitled to recover the expenses out of the common fund which their efforts have recovered for the class of plaintiffs represented.

D.

All of the expenditures made or proposed to be made which are specifically described in the complaint are within the purposes prescribed by the franchise ordinances.

While we feel that the principle reason for dismissing the complaint in this case is that the plaintiffs lack an interest in the fund, the complaint is also fatally defective in that it wholly fails to make out a case on the supposed misuse of the traction fund. The brief of petitioners does not favor us with an analysis of the allegations charging the defendants with unlawful diversion of the moneys in the traction fund to demonstrate why the expenditures made or contemplated are in violation of the provisions of the franchise ordinances.

An examination of that portion of the complaint alleging the supposed breaches of trust (Tr. pp. 19-45) discloses that it is replete with vague conclusions of law and fact which are clearly improper bases for the complaint. The specific allegations relating to definite expenditures and proposed expenditures reveal that those expenditures were wholly proper under the provisions of the franchise ordinances as construed by the Illinois Supreme Court in *Barsaloux* v. *City of Chicago,* 245 Ill. 598 and *People* v. *City of Chicago,* 349 Ill. 304. We have discussed these cases earlier in the brief and have pointed out that the court in these cases has held that the traction fund may properly be used not only for the purchase and construction of surface, elevated and underground street railways, but also for preliminary and incidental work in connection with such purchase and construction. The expenditures complained of specifically in the complaint clearly fall within the scope of permissible expenditures, namely, payment to a title company for a title search for proposed street widening projects to accommodate a subway (Tr. 20), charges in connection with studies and preparation of plans for construction of subways and franchise ordinances providing for acquisition of street railways (Tr. 20-24), expenses incidental to construction of subways and acquisition of street railways (Tr. 24-25), expenses of submitting to referendum a proposed comprehensive traction ordinance (Tr. 25), and proposed use of the traction fund under the provisions of the comprehensive traction ordinance dated June 19, 1941 (Tr. 26-29). With respect to the last item, *People* v. *City of Chicago,* 349 Ill. 304, has squarely upheld the use of the traction fund under the comprehensive traction ordinance of 1930, the provisions of which are practically identical

with the comprehensive traction ordinance of 1941 so far as it relates to the use of the traction fund.

The foregoing are all of the specific charges contained in the complaint and which are proper to consider in determining the sufficiency of the complaint. The balance of the charges of supposed violations of the trust (Tr. 30-45) are composed of general allegations, irrelevant communications, irrelevant dissertations on political history, aldermanic statements, a letter to the editor of the Chicago Daily News from a car rider (Tr. 44), and like incompetent matters.

Even if the plaintiffs did have an interest in the traction fund, we submit that the complaint does not state a good cause of action upon the theory of misuse of the moneys in that fund.

Conclusion.

It seems obvious that the named plaintiffs, residing in five different states other than Illinois cannot possibly possess a *bona fide* interest in the Traction Fund of the City of Chicago. It is nothing short of preposterous that these six non-residents spread all over the country should spontaneously and simultaneously conceive the idea of filing a suit on behalf of the millions of resident car riders purporting to protect them from alleged mismanagement of the Traction Fund. The conclusion is irresistible that the present suit was conceived and engineered by the attorney for the plaintiffs with the purpose in mind of manufacturing some basis for a claim for attorneys' fees in the remote contingency of success in proving the alleged misappropriation. We believe we are justified in making the assertion that the complaint was not filed in good faith. That fact ought to be manifest from the complaint itself.

Aside from having no practical interest, the named plaintiffs have no legal interest in the Traction Fund, as we have demonstrated in our brief. The judgment of the District Court and the affirmance thereof by the Circuit Court of Appeals were completely warranted. It is respectfully submitted that the Petition for Certiorari be denied.

Respectfully submitted,

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City of Chicago,
Attorney for Respondents.

JOSEPH F. GROSSMAN,
First Assistant Corporation Counsel,

J. HERZL SEGAL,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 259

S. D. TILNEY, W. C. HAM, ET AL.,
Petitioners,

vs.

CITY OF CHICAGO, A VOLUNTARY MUNICIPAL CORPORATION, AND OTHERS, INDIVIDUALLY AND AS TRUSTEES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Reply for Petitioners.

Respondents admit at pages 15 and 20 of their brief:

"The traction fund is a trust fund in the sense that the monies are to be used only for the purposes prescribed by the (year 1907) franchise ordinances" and "that fund is to be expended for the purposes specified in the ordinance."

Who can be more directly parties to the year 1907 ordinances than your petitioners, who exclusively have paid the overall moneys collected for all purposes whatever under said ordinances. See our petition at page 30.

Respondents *do not answer* the petition. They ignore all that is shown about co-operative economy. They disregard entirely the history behind these ordinances. See our Petition at pages 3 and 14 ff. Respondents evade. They file only a "brief in opposition for certiorari." The substance and the reason and the equity of the record and the petition, stand admitted before this Court.

The personal remarks at page 29 of the "brief in opposition" seeking to impugn the motives of petitioners in this Court, is an attempt to confuse the issues. These personal remarks are a repetition of language by the same respondents in their brief in this court in the case of *Blair* v. *City of Chicago*, 201 U. S. 400. (That ruling by this Court directed the decrees by which the year 1907 ordinances were adopted and confirmed. 136 Tr. ff.) In that case this Court effectually disposed of that same personal language and argument (page 407) by the respondents, and gave judgment against respondents as follows (page 449):

> "As to the conspiracy to get the case into the Federal court, with a view to the decision of the rights of the parties therein, we are not aware of any principle which prevents parties having the requisite citizenship and a justiciable demand from seeking the Federal courts for redress, if such be their choice of a forum in which to have contested rights litigated. Having a proper cause of action and the requisite diversity of citizenship confers jurisdiction upon the Federal courts, and in such cases the motive of the creditor in seeking Federal jurisdiction is immaterial. (Citing cases.)
>
> "It is true that the judgments were taken and the receivers appointed on the same day, and it is quite likely that the receiverships were in view when the judgments were taken, and that preparations had been

made in that direction, but we perceive in this no legal objection to the jurisdiction of the court."

Actually what respondents have done is to copy in this Court the substance of their brief in the Court of Appeals. That does not accord with the rules of this Court. Such action by the respondents fails to raise any issue upon the petition. By failure to answer, the respondents admit that they are trustees of the funds brought into court by this record. They admit that they became such trustees by proceedings at the foot of prior decrees in these same federal courts (Tr. 136 ff, petition 56). They challenge the power of this Court just as the officials did in the *City of Dublin* case. And they boldly say that no Court may require them to account. They flout the foremost and primary duty of all trustees.

How completely respondents seek confusion is shown by the complaint (B-13, Tr. 15 and 131); and is illustrated by the parallel situation of a derivative stockholders suit. Here as there *the petitioners are like relators who act to set the machinery of the court in motion, whenever the trustees or the corporation fail to do so for the protection of the fund. Bingham* v. *Ditzler,* 309 Ill. App. 581 and 320 Ill. App. 88, 91, 33 N. E. (2d) 939 and 49 N. E. (2d) 812, 813 is an example. The Court there rules at page 813:

"* * * The minority stockholder institutes the action simply in order to set in motion the judicial proceedings so as to accord to the injured corporation the relief to which it is entitled."

In that case as in the case at bar, the movants were not awarded any direct financial relief. Direct relief to plaintiffs is never a test in a class suit. Financial profit is not the purpose of co-operative economy.

Likewise in the case at bar your petitioners act "to set in motion the judicial proceedings" for the municipaliza-

tion of street railways at Chicago, so that the trust fund may be restored and the trust may be performed. Petitioners insist again (as respondents admit at page 20 of their brief) "that fund is to be expended for the purposes specified in the (year 1907) ordinance:" namely, for the consumer ownership of the street railway system of Chicago. That is the measure of the duties *which the respondents have not performed.* Only the revenue car riders (your petitioners) can ever collect any benefit by enjoying the better transportation service to be provided by that performance of trust. Like the householders in the *City of Dublin* case, your petitioners seek to have these duties performed and enforced.

City of Moline, Town of Aurora and Dublin Cases.

These cases confirm Point A-7 at page 40 of Petition. The respondents carefully omit any discussion of the case of *Town of Aurora* v. *C. B. & Q. Ry. Co.,* 119 Ill. 246. They also ignore *City of Moline* v. *Greene,* 252 Ill. 475 at 480, which is relied upon by our Petition at pages 19 and 52. In that case inhabitants as "cestuis que trustent" (page 480) objected when the City sought to take 10 feet off library grounds to widen the street. The Court said:

> "*As inhabitants* and taxpayers of the city, *for whose use and benefit the library was established* and the title to it held in trust, *they were interested and concerned in the preservation of the property for the purposes to which it was devoted.* In our opinion, the court did not err in entertaining the objections and overruling appellant's motion to strike them." (Page 481.)

The opinion further states:

> "*The library was established by an ordinance* adopted in 1892 in accordance with the provisions of

the statute. The property was purchased for $10,000, and *the money to pay for it was raised by subscription. The deed was made* to the board of directors of the Moline Public Library of Moline, Ill., *and contained no conditions.* A donation of $40,000 was made by Andrew Carnegie for the construction of the building." (Page 477.)

"* * * *The legal title* to the library property is in the library board, but it *is held by them in trust* for the inhabitants of the city; the use of the library and property to be forever free to said inhabitants. *The inhabitants* of the city *are the real parties in interest,* for whose benefit the title is held in trust by the board of directors." (Page 480.)

In the case at bar the year 1907 ordinance trust agreement provides:

"The said City shall *deposit* the amount so paid to the said City *to the credit of a separate fund to be kept and used for the purchase and construction of street railways.*" (Tr. 8 and petition 9 and 26.)

That *City of Moline* case and said *Town of Aurora* case (page 24 of our Petition) in Illinois, and the *City of Dublin* case (1 Bligh N. R. 312) before the House of Lords, are directly in point to sustain the right of your petitioners to be heard at Court as "cestuis que trustent", (page 480), "real parties in interest" (page 480), and persons for whom as former and future (Tr. 2) revenue patrons of street railway service, "the legal title is held in trust" (page 480). These authorities sustain the proposition that your petitioners are directly and exclusively interested and concerned in the matter of Municipalization of Street Railways at Chicago. We are the real parties in interest for the preservation of the fund created expressly and historically for that sole purpose.

The motion by Respondents in the District Court (Tr. 98) to dismiss the complaint admits the truth of the complaint including paragraph A-6 which reads as follows

"Plaintiffs are Sole Beneficial Owners.

A-6) The fares charged and collected in excess of just compensation, for transportation services rendered, were so paid by the plaintiffs who constitute the class of car riders, and were received, were segregated as percentages of totals, and paid over into said car-riders-overcharge-trust-fund to be held in trust by the defendants to this suit, and solely to be applied for the use and benefit of the class of persons, who are revenue car riders at any time. The plaintiffs alone are damaged and may complain, when any question as to safeguarding the custody or application of the car-riders-overcharge-trust-fund does arise for decision" (Tr. 4 and 126).

The general principles of equity and the constitutional basis upon which the petition is founded (Tr. 47 ff and 121 ff and 152) are not questioned by the respondents in their "brief in opposition." The fundamental duty of this Court to make precedent where none exists, whenever basic social grievances of the magnitude herein are shown, is not questioned by the respondents.

Some italics are used in this petition for emphasis.

Discussion of *Barsaloux* case follows as an appendix.

Petitioners ask again that the writ of certiorari be ordered and that this record be reviewed by the Supreme Court.

Respectfully submitted,

WEIGHTSTILL WOODS,
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77 West Washington Street,
Chicago, Illinois.

APPENDIX.

Petitioners submit that in all the taxpayer and special assessment cases (which counsel for respondents admit (in brief at page 20), do show a sufficient property interest to sustain full length litigation) the item about which complaint was made is always a small percentage or remote residue arrived at by accounting and calculation out of the aggregate tax or special assessment paid by each of the class of petitioners. *Id certum est quod certum potest.* The general statements (with implied assumption to the contrary) made by respondents at pages 6, 10 and 18, are only pious wishes.

The "brief in opposition" is no more than an argument that some of the cases which are listed at the foot of the petition, are not completely exact precedents, and might be distinguished in marginal and remote ways. (Petitioners do not admit that argument and will challenge the whole of it when the court authorizes the filing of a definitive brief for appellants.)

The Fraudulent Barsaloux Case.

In this Court the Respondents rely upon the case of *Barsaloux* v. *City of Chicago,* 245 Ill. 598. As matter of pleading the motion by Respondents to dismiss (Tr. 99) is an admission of the truth of that part of *the complaint* (Tr. 54), which *establishes as fact* that the *Barsaloux* case and the other cases mentioned by the Respondents, (their brief pages 14 and 27), are wholly fraudulent proceedings, so far as your petitioners are concerned. Your petitioners were not made parties thereto and are not bound thereby.

(See our Petition at Tr. pages 51 and 52.) Respondents assume facts which they must prove after they make answer to the complaint in the District Court. Their brief here is a speaking demurrer. If this Court issues the writ so that counsel for your petitioners may file a definitive brief, a full length analysis of the Barsaloux line of cases will be made. From that analysis it will appear that those cases are not any authority whatever, and are not persuasive upon any of the points mentioned by the Respondents. At this time only brief mention will be made by way of example.

The opinion in the *Barsaloux* case, 245 Ill. at page 604 includes this language:

> "* * * It is charged in the bills that the city of Chicago (1) is entirely without power or authority to either build or authorize the building of subways (2) such as are described in the said ordinances (3) or to grant authority to any other corporation to so build such subways, and that the (4) appropriation and payment of any public funds, (5) either from the special traction fund or the general corporate funds of the city, (6) for preliminary work in connection with such subways (7) is illegal and a (8) misappropriation of public funds, (9) which may be enjoined *at the suit of an interested taxpayer.*"

The numbering is supplied by Petitioners for emphasis.

The question decided in the *Barsaloux* case was that *the City of Chicago has the statutory power to build or to purchase street railway lines or subways.* No where in that case can be found one word as to the use of the Traction fund to build a subway for the elevated steam railroads. (See Page 609.)

In that *Barsaloux* case general demurrers were sustained to two separate bills of complaint. The opinion covers matters involved in both complaints, and includes matters involved with respect both to street railroads as such, and

also elevated steam railroads. The latter were covered only by an appropriation, not from the street railways fund but from the general corporate fund. (245 Ill. at 601.) It is elementary law in equity that where any point in a bill of complaint is good, the fact that there are other points in the case which are debatable or bad, will not prevent the overruling of all general demurrers. That manner of overruling of such general demurrers was done in that record. Furthermore, the Supreme Court of Illinois have established as law for that state that whenever an opinion covers more than one point, (at least 9 points involved in Barsaloux record and quotation above) the opinion is not *res judicata* nor persuasive in any other litigation, between the same parties or any other parties. *City of Geneseo* v. *Illinois Northern Utilities Co.*, 378 Ill. 506 at 519.

Furthermore since opposing counsel admit in this court (pages 15 and 20 of their brief) "that fund is to be expended for the purposes specified in the (year 1907) ordinance," they admit before this Court that it is a trust fund, in which Barsaloux (and Venner and Price and Dudick and others) as taxpayers had no interest whatever. *Price* v. *Mattoon*, 364 Ill. 512. The cases cited by Respondents refute the very contentions asserted by Respondents.

Also there is no language in the opinion in the *Barsaloux* case to authorize the use of any part of the traction fund for expenses for preliminary surveys for subways or street railways. There is nothing in the record or the opinion in the *Barsaloux* case to suggest that any part of the traction fund can be used for any purpose whatever pertaining to *steam railroads, whether surface, elevated or subway.* (See page 26 of our Petition for Writ of Certiorari, and *Gillette* v. *Aurora Railways Co.*, 228 Ill. 261 at 272 ff.) The appropriation made in the *Barsaloux* case with reference to elevated railroads, *was made from the*

general corporate fund. (Page 601.) The Court by its opinion in the *Barsaloux* case was primarily concerned with the question whether the City of Chicago had statutory power to construct subways for *street railway downtown terminals.* The opinion merely says

> "The power to construct (under the statute) necessarily includes the power to take the preliminary steps contemplated by the appropriation ordinance in question." (Page 612.)

The power given under the Mueller law to construct subways would require financing either from the general corporate fund of the city, or from revenue certificates under the Mueller law. The present record is not concerned with that kind of financing. That manner of financing is not before this Court on this record. The financing accomplished here is by a consumer co-operative established by the year 1907 Ordinances.

Complete Sabotage and Wastage of the Trust.

The breaches of the trust committed wilfully by the Respondents, set forth by the complaint and admitted by the motion to dismiss, appear at pages 19 to 45 of the record. It stands admitted that no street railways have been purchased and none have been constructed. Up to now none are owned by this trust fund which was set up by Ordinances to establish a consumer co-operative to purchase and own the street railways of Chicago. It stands admitted that your petitioners as members and this consumer co-operative which was provided for by the year 1907 ordinances, have paid into this trust about one hundred million dollars. It stands admitted by this record that the purpose of that consumer co-operative was to put an end for all time, to the political broils and court receivership proceedings which had occurred at Chicago prior to the year 1907. That is shown by the history of events summarized by the petition for writ of certiorari and estab-

lished by the record. This record clearly shows a firm determination that the recurrent breakdown of local transportation systems at Chicago organized upon the capital-debt-dividend-interest-form of financial structure, was to be superseded by a consumer co-operative economy to provide local transportation at cost without any debt structure.

It is apparent that the brief and argument for the Respondents now advanced, ignores entirely the purposes of the provision made by the year 1907 ordinances and repudiates the idea that there is such a thing as co-operative economy in the world. Respondents cannot conceive that any service economy exists. The Respondents do not remember that there was a feudal system built entirely upon services and the right to services. For them the man who has paid in advance at a hotel has no remedy at court. For them the occupant of a co-operative apartment cannot go to court. For them the occupant of an apartment hotel has no remedy at court and may be evicted without ceremony. For them no member of any club, no family having paid perpetual care in a cemetery, no person who has contributed to any mutual insurance company, no person who has contributed to a fund for hospital care has anything more than moral obligation in his favor. Repondents say to this court that all such persons may be pushed aside whenever the people in power seek to say so.

Respondents' Balance Sheet.

Respondents ignore blandly and blissfully their own balance sheet as of December 31, 1941 which appears at page 157 of this record. That document shows less than $4,200,000 cash on hand at that date, just before this suit was filed. It shows nearly thirty-two millions wasted in worthless tax anticipation warrants, in which trustees cannot invest under the laws in the State of Illinois (Tr. 148). It shows more than seven million dollars wasted in

investigations and plans during the 30 years prior to 1931. All of that is positively contrary to the terms of the year 1907 ordinances. Repondents claim that they have rightfully spent about twenty millions upon subways for the use of elevated steam railroads. Those railroads were not involved in any manner in the year 1907 court proceedings, nor in the year 1907 ordinances, nor have they, nor any of their patrons ever contributed one penny toward the trust fund in question in this case now in this Court. It would be just as logical for Respondents to say that they had invested that fraction of the trust fund in a tunnel subway to connect the Chicago and Northwestern Steam Railroad north of the Chicago River, with the Illinois Central Steam Railroad south of the Chicago River. That improvement often has been suggested and no doubt would be of some general benefit to the travelling public at the City of Chicago. But neither the thing which Respondents say they have done, nor this possible improvement of transportation, would have any relation whatever to the purposes of the year 1907 ordinances, nor to any proper use of the trust fund now before this Court.

This Court is fully cognizant of the tremendous growth of trust funds to be administered by public officials, Federal, State and Municipal, who are made custodial trustees. If this trust at bar is sabotaged successfully, then all Social Security Programs in this country are additional follies. (Petition P. 30.) Your Petitioners appeal to the primary duty of this Court to protect, preserve and defend the trust relationship, for the reasons shown upon this record.

Respectfully submitted,

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